CHAPTER 3

Commitment to a Psychiatric Facility

Scope Note

This chapter covers how commitments are made to psychiatric facilities. It addresses the commitment process, including the trial, criteria for commitment, and the burden and standard of proof.

§ 3.1 INTRODUCTION

Involuntary commitment to a psychiatric facility in Massachusetts cannot be based solely on the existence of a mental illness or that the person may benefit from the treatment. The court must find, beyond a reasonable doubt, that the statutory criteria for commitment are met. The criteria, the burden of proof and standard of proof, as

discussed in this section, apply generally to commitments under G.L. c. 123, except for commitments under G.L. c. 123, §§ 12(e) and 35 and observational commitments under G.L. c. 123, §§ 15(b), 15(e), 16(a), and 18(a).

§ 3.2 INITIATING THE COMMITMENT PROCESS

Petitions for commitment can only be filed by the superintendent of a facility or by the medical director of Bridgewater State Hospital (petitioner). G.L. c. 123, § 7(a) and (b). Petitions can be filed in the District, Municipal, or Juvenile Court having jurisdiction over the facility. The petitions must be filed prior to the expiration of the applicable statutory period. This time period depends on whether the person was admitted as a conditional voluntary patient and signed a notice of intent to leave the facility, was admitted pursuant to G.L. c. 123, § 12 and did not change their status to conditional voluntary, or was previously hospitalized under a court order that is about to expire.

§ 3.2.1 Practice Advisory

The statutory time limits governing civil commitment in Massachusetts are to be strictly construed. A petition may not be filed after the expiration of the three-day period or after the previous commitment order has expired. If a petition is filed after these time periods expire, it must be dismissed. *Hashimi v. Kalil*, 388 Mass. 607 (1983) (time limits established in G.L. c. 123 are jurisdictional and to be strictly construed); *see Commonwealth v. Parra*, 445 Mass. 262, 263 (2005) (statute's deadlines are mandatory to protect defendant's liberty interest); *In the Matter of C.D.*, 2015 Mass. App. Div. 29 (delay of eight days in filing commitment petition requires dismissal); *see also* Dist. Ct. Standard 3:01 (motion to dismiss must be allowed where statutory time limits not adhered to). "If a patient's liberty interests are to have any guarantee under G.L. c. 123, § 12(d), then the strict time requirements of the statute must be met." *In the Matter of C.D.*, 2015 Mass. App. Div. 29.

The petitioner may file seeking commitment only if a person is still a patient. *See* G.L. c. 123, § 7(a), (b). A client whose three-day period or commitment has expired may not be retained unless a commitment petition has been filed. G.L. c. 123, § 6(a). Failure to timely file a petition has the effect of discharging the client since the person is no longer a patient of the facility. *In the Matter of C.B.*, 2013 Mass. App. Div. 42. Counsel should move to dismiss an untimely filed commitment petition.

§ 3.2.2 Assignment of Counsel

A person against whom a petition seeking involuntary commitment to a mental health facility is filed has the right to be represented by counsel. G.L. c. 123, § 5. The person is presumed to be indigent. SJC Rule 3:10, § 1(f)(iii). If the person has funds held in trust by the Department of Mental Health or the Department of Correction, the person may be ordered to contribute to the cost of court-appointed counsel from the funds held in trust. G.L. c. 123, § 18A. The court should notify the Committee for Public Counsel Services (CPCS) as soon as the petition is filed. SJC Rule 3:10, § 6. CPCS

will assign counsel from its list of certified mental health attorneys or Mental Health Litigation Division (MHLD) staff attorneys.

If the person refuses legal representation, the court must determine whether the waiver of counsel is competent. SJC Rule 3:10, § 3. If the person is not competent to waive counsel or is unable to exercise their rights effectively at a trial, standby counsel must be appointed. SJC Rule 3:10, § 3. If the person objects to a particular attorney, despite that attorney's best efforts to establish an effective professional relationship, the attorney should move to withdraw and ask that successor counsel be assigned. In doing so, counsel should avoid divulging any information, especially confidential information that might be harmful to the client's interests. The court should determine whether the person's objections are reasonable. If so, the motions should be allowed and successor counsel appointed. If not, the motion to withdraw should be denied and the attorney should continue as counsel or be directed to serve as standby counsel. SJC Rule 3:10, §§ 3, 6; Dist. Ct. Standard 3:03.

If a client in a mental health proceeding is also a defendant in a criminal proceeding, a party in an immigration proceeding or child custody case, assigned counsel should immediately contact the other attorneys to coordinate representation. While not required to do so under G.L. c. 123, the court should immediately notify the criminal defense counsel and afford that attorney the opportunity to be heard at a trial on a petition filed under G.L. c. 123, §§ 7, 8, and 8B. Dist. Ct. Standard 3:03.

Counsel, or an unrepresented person, must be afforded at least two days from the notice of appearance to prepare for the trial. G.L. c. 123, § 5.

§ 3.3 THE COMMITMENT TRIAL

A commitment petition filed under G.L. c. 123, § 7 seeking a person's initial commitment (i.e., retention after a three-day commitment under G.L. c. 123, § 12 or after a conditional voluntary admittee's submission of a three-day notice of intention to leave) must be commenced within five business days of the filing of the petition, unless a continuance is requested by the client or respondent's counsel. G.L. c. 123, § 7(c). Computation of time limits under Section 7 are governed by Rule 6 of the Massachusetts Rules of Civil Procedure. A commitment petition filed under G.L. c. 123, §§ 15, 16, and 18, or a petition filed under G.L. c. 123, § 7 seeking a person's recommitment, must be commenced within fourteen days of the filing of the petition, unless a continuance is requested by the person or respondent counsel. G.L. c. 123, § 7(c). The trial court must grant a continuance where a denial is reasonably likely to prejudice a person's ability to prepare a meaningful defense to a civil commitment. *Matter of N.L.*, 476 Mass. 632 (2017).

The person may waive their right to a trial, in writing, only after consulting with counsel. *See In re J.B., J.J. & E.E.*, 2014 Mass. App. Div. 233 (court does not have discretion to deny client's otherwise valid waiver of trial). However, if the respondent waives their right to a trial, the respondent can request a trial, for good cause shown, at any time during the period of commitment. G.L. c. 123, § 6(b). Moreover, if the initial trial

is waived and there has been no trial, then the client cannot be recommitted without a trial. G.L. c. 123, § 8(d).

The trial court has the discretion to hear the case at the petitioning facility or at the courthouse. G.L. c. 123, § 5. After consulting with the client, counsel should consider filing a motion to have the trial at the courthouse. This may be required by the Americans with Disabilities Act. See pleadings in *Solomon Carter Fuller Mental Health Center v. M.C.*, 481 Mass. 336 (2019) at SJC-12481 Case Docket.

The client has a right to attend the commitment trial. The court may proceed in the respondent's absence when the absence is requested by the client and their counsel, or upon a showing of extraordinary circumstances. *Melrose-Wakefield Hosp. v. H.S.*, 2010 Mass. App. Div. 247; *cf.* Dist. Ct. Standard 4:00. The trial is adversarial, with counsel permitted to "inquire fully into the facts of the case and vigorously advocate for [their] client." Dist. Ct. Standard 4:03. Where the client is a defendant in a criminal proceeding or an insanity acquittee, the district attorney must be notified of all commitment and recommitment trials, and be afforded the opportunity to be heard at such trials. G.L. c. 123, § 16(d). The court must render its decision within ten days of the completion of the trial, unless an extension is granted for good cause by the administrative justice for the District or Juvenile Court Department. G.L. c. 123, § 8(c).

The trials are presumptively open to the public as a matter of common law. However, upon motion of either party, a trial or part of a trial may be closed if the court finds that the party has "an overriding interest that is likely to be prejudiced" in a public trial. The trial court first must consider reasonable alternatives to closure, but if closure is allowed, it must be "no broader than necessary to protect that interest." *Kirk v. Commonwealth*, 459 Mass. 67, 79 (2011). For example, the court may close a portion of the trial if that will protect the party's overriding interest in closure. The court must make specific findings adequate to support closure. *Kirk v. Commonwealth*, 459 Mass. at 79.

§ 3.3.1 Five-Day or Fourteen-Day Period

The five-day or fourteen-day period within which a trial on a petition to commit must commence is statutorily mandated and may be extended only upon the request of the respondent or respondent's counsel. G.L. c. 123, § 7(c). If this requirement is not met, a motion to dismiss must be allowed. *Hashimi v. Kalil*, 388 Mass. 607 (1983) (time limits established in G.L. c. 123 are jurisdictional and to be strictly construed); *Commonwealth v. Parra*, 445 Mass. 262, 263 (2005) (statute's deadlines are mandatory to protect defendant's liberty interest); *In the Matter of C.D.*, 2015 Mass. App. Div. 19; *see also* Dist. Ct. Standard 3:05. In computing these time periods, day one is the day following the filing of the petition. Saturdays, Sundays, and legal holidays are not counted. If the fifth or fourteenth day falls on a Saturday, Sunday, or legal holiday, the trial must be commenced on the court's next business day. Mass. R. Civ. P. 6(a). The District Court Standards include a chart for calculating the timing of trials.

§ 3.3.2 Commencement of Trial

The mere calling of a case does not constitute commencement for purposes of compliance with the timelines in G.L. c. 123, § 7(c). Commencement entails, at a minimum, "the swearing of a witness, or of some evidence being taken." *Melrose-Wakefield Hosp. v. H.S.*, 2010 Mass. App. Div. 247 (Mass. App. Div. 2010) (while initial trial was set within statutory five-day period, trial was rescheduled because patient was not present, no witness was sworn, and no evidence was taken at that trial, thus trial was not "commenced" within mandatory time frame and delay was caused by hospital's unilateral action in causing patient not to be present). It is not enough that a witness testifies. The witness must provide "meaningful information regarding the petition for commitment." *Matter of R.R.*, 2018 Mass. App. Div. 125 (Dist. Ct. 2018) (citing to *Matter of K.P.*, 2017 Mass. App. Div. 4).

§ 3.3.3 Waiver of Trial

Confinement in a psychiatric facility constitutes a substantial deprivation of liberty. *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 2:00. Further, the petitioner bears the burden of proving, beyond a reasonable doubt, that the criteria for commitment have been met. *Worcester State Hosp. v. Hagberg*, 374 Mass. at 275–77. Counsel should only agree to waive a commitment trial after consulting with their client and securing the client's informed consent.

§ 3.3.4 Criminal Defendants and Insanity Acquittees

The prosecuting district attorney may inspect all reports and papers in the court's file concerning a pending commitment case of a criminal defendant. G.L. c. 123, § 36A. This right to inspect is limited to documents filed with the court and does not apply to mental health records held by the facility. General Laws c. 123, § 16(d) authorizes the district attorney to appear and be heard, but is not made a party to the commitment proceeding, nor may the district attorney submit information "unconstrained by the usual evidentiary rules (i.e., relevance, personal knowledge, oath or affirmation, and cross-examination)." *Cf. Adoption of Sherry*, 435 Mass. 331, 338 (2001).

§ 3.3.5 Location of Trials

While the statute permits, and it is common for, the courts to conduct commitment trials at facilities rather than at courthouses (G.L. c. 123, § 5), such practice is regrettable and likely a violation of the federal Americans with Disabilities Act (42 U.S.C.A. § 12101 et seq.). It may also be a denial of due process and equal protection under the federal and state constitutions. See pleadings in *Solomon Carter Fuller Mental Health Center v. M.C.*, 481 Mass. 336 (2019) at SJC-12481 Case Docket.

Holding the trials in a substandard location is a violation of District Court Standard 4:00. (Note that while the District Court Standards refer to "hearings," we refer to

these proceedings as "trials," as they should be accorded the same gravity as all other trials.) When we think of courts, judges, and the law, the image is one of solemnity and decorum—judges in robes ascending to the bench to oversee the proceedings; lawyers standing respectfully to address the court and present evidence; and witnesses escorted by uniformed court officers to the witness stand. All of these practices are intended to instill a sense of respect for the judicial process and institution. It is unusual to conduct judicial trials in other, less formal settings. Indeed, there is no other class of litigants for whom the courtroom is, as a matter of practice, off limits. 10 *Mental & Physical Disability Law Reporter* 61-2 (1986) (referencing Massachusetts Standards of Judicial Practice for Civil Commitment trials urging that the location that "befits the seriousness of the proceeding in which an individual's liberty is at issue").

The discretion to hold commitment trials at mental health facilities accorded the courts under current law (G.L. c. 123, § 5) should be exercised only infrequently as circumstances warrant. For many years, commitment cases were routinely conducted in court. Over the years, however, the exception has become the rule—most commitment trials today are held at facilities, with clients, judges, lawyers, witnesses, and assorted hospital staff sitting around a table in a hospital conference room. The result is that clients do not feel as though they and their cases are being taken seriously and that they have not had their day in court.

The District Court Standards address this issue. Standard 4:00 provides that

> [a]ll court trials should be held in rooms of adequate size and appropriate condition for dignified and impartial judicial trial. The physical setting must be sufficient to provide for appropriate security, permit public access, and elicit the customary respect accorded to court proceedings and parties before the court.

The commentary to Standard 4:00 states as follows:

> The room should contain the furnishings normally found in a courtroom, including the required federal and state flags. G.L. c. 220, § 1. There should be a separate desk or table for the judge, with a suitable chair, and a separate chair nearby to serve as a witness stand. The litigants and counsel should be seated at separate tables, facing the judge. In most physical settings, having the judge, counsel and witnesses seated around the same conference table will prove too informal and should be avoided. The judge must wear a robe, [citations omitted] and attorneys and witnesses should be in attire appropriate for a formal court proceeding.

There is a significant cost for the Commonwealth when trials are conducted in mental health facilities. The time spent and costs incurred by judges and court officers in traveling to and from the facilities are substantial, as are the expense of and the administrative difficulty in providing alternative coverage in court. Further, to the extent that

the location of trials has any effect on the expenses incurred by respondents' attorneys in commitment proceedings, it is likely that such expenses are increased when trials are held at facilities, since attorneys are far more likely to locate their offices near courthouses than near hospitals. Whenever a trial is scheduled to be conducted at a facility, counsel should consult with the client as to whether the client would prefer that the trial be held at the courthouse. If so, counsel should move to hold the trial at the courthouse.

§ 3.3.6 Client's Attendance at Trial

The client has a right to attend the trial. Only where a client is unable or unwilling to attend should the court proceed in the client's absence. If the client is not present, the court should inquire of the client's counsel as to the cause of the client's absence. If the client is unwilling to attend, the trial may proceed upon a finding by the court, based on the respondent counsel's representations that the client has knowingly and voluntarily chosen not to attend. If such representation or finding cannot be made, the court should take reasonable steps to secure the client's attendance. For example, all or part of the trial may be held on the client's ward or at some other suitable location that will permit the client to attend.

If it is represented to the court that the client is unable to attend the trial due to medical or security concerns, the court should hear from counsel and take reasonable steps to secure the client's attendance. For example, if the inability to attend is due to the client's medical status, a continuance may be ordered. Where security is a concern, protective measures may be undertaken. However, the client's right to be present at a commitment trial cannot be abrogated merely because the hospital asserts that attendance would be unsafe. At a minimum, the court should conduct a trial in which the petitioner has the burden of proving that the client is incapable of attending the trial. *Melrose-Wakefield Hosp. v. H.S.*, 2010 Mass. App. Div. 247. If a trial proceeds without the client in attendance, the court must not draw any adverse inferences from counsel's representations or assertions. The decision as to the client's commitability must be based solely on the evidence presented at the trial.

§ 3.4 CRITERIA FOR COMMITMENT

§ 3.4.1 Statutory and Regulatory Criteria

Commitment to a DMH or private mental health facility requires that the court find the following:

- The client is mentally ill as defined in 104 C.M.R. § 27.05, i.e., they have "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." This 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 C.M.R. § 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.

- Failure to retain the client in such a facility would create a likelihood of serious harm as a result of his or her mental illness, G.L. c. 123, § 8(a).
- There is no appropriate setting that is less restrictive of the person's liberty than the facility, *Commonwealth v. Nassar*, 380 Mass. at 917–18 ("Regardless of the constitutional place of such a doctrine ['least restrictive alternative'], either in general or in the particular context, we think it natural and right that all concerned in the law and its administration should strive to find the least burdensome or oppressive controls over the individual that are compatible with the fulfillment of the dual purposes of our statute, namely, protection of the person and others from physical harm and rehabilitation of the person."). See also *Gallup v. Alden*, 57 Mass. App. Dec. 60 (1975), for a thorough discussion of least restrictive alternative.

§ 3.4.2 Commitment to Bridgewater State Hospital

In order for a male to be committed to Bridgewater State Hospital, the court must find that

- the client is mentally ill, G.L. c. 123, § 8(b);
- the client is not a proper subject for commitment to any facility of the Department of Mental Health, G.L. c. 123, § 8(b); and
- failure to retain the client in strict custody would create a likelihood of serious harm, G.L. c. 123, § 8(b).

No case, to date, discusses what is needed to establish the need for strict custody.

§ 3.4.3 Burden and Standard of Proof

Recognizing the substantial deprivation of liberty resulting from the involuntary confinement of a person in a mental health facility, the Supreme Judicial Court has held that the petitioner must prove, beyond a reasonable doubt, that the criteria for commitment are met. *Worcester State Hosp. v. Hagberg*, 374 Mass. 271 (1978). The petitioner must be the superintendent or administrative head of a public or private mental health facility. The only exception is for defendants in criminal cases who are found not competent to stand trial or not guilty by reason of mental illness or defect. In such cases, the district attorney may, in some circumstances, file for commitment. Similarly, the administrative director of a jail or prison where a person is awaiting trial or serving a sentence may also file for commitment after an examination finding that there is a need for commitment. See G.L. c. 123, §§ 16(b) and 16(e) and G.L. c. 123, § 18(a), respectively.

§ 3.4.4 Practice Advisory

(a) *Mental Illness*

The petitioner must present evidence of the factors meeting the definition of mental illness—i.e., a "substantial disorder" that "grossly impairs." 104 C.M.R. § 27.05(1). Where such evidence, beyond a reasonable doubt, is not presented by the petitioner, counsel should move for (and the court should order) denial of the petition.

The fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association 2013) (hereinafter "DSM-5") is generally used by mental health practitioners to diagnose mental disorders. The petitioner's expert witness, a psychiatrist or psychologist, will testify that the person suffers from a psychiatric disorder found in the DSM-5. Some courts will insist that a specific DSM-5 diagnosis be proffered. A clinical diagnosis is not, in itself, sufficient to warrant a finding of mental illness for purposes of commitment. Dist. Ct. Standard 2:00. The definition of mental disorder in the DSM-5 is not the same as the DMH definition of mental illness. Such testimony is arguably irrelevant and can be quite damaging to a client due to the images often conjured up when one hears labels such as *schizophrenic* and *psychotic*. Indeed, the editors of the DSM-5 specifically caution about its use in the forensic settings.

> [T]he use of the DSM-5th should be informed by an awareness of the risks and limitations of its use in forensic settings. When the DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM-5 mental disorder . . . does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard . . . additional information is usually required beyond that contained in the DSM-5 diagnosis. . . . It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability.

DSM-5 at 25.

A person cannot be committed under G.L. c. 123 solely by reason of a developmental or intellectual disability as defined at G.L. c. 123B, § 1. *See also* Dist. Ct. Standard 2:00. However, if a person is both mentally ill and developmentally disabled, that person may be committed if there is a likelihood of serious harm as a result of mental illness. *Commonwealth v. DelVerde*, 401 Mass. 447 (1988). An inpatient behavioral health facility may not provide the services that the dually diagnosed client requires and will not be an appropriate setting for that person.

(b) *Likelihood of Serious Harm*

The petitioner must present evidence that the respondent's behavior or judgment poses one or more of the risks in G.L. c. 123, § 1. It is not enough that a person suffers from a disorder and that others who suffer from the same condition might be dangerous. The particular actions or behavior of the client that give rise to the alleged risk of harm may be either overt acts or acts of omission. *Commonwealth v. Nassar*, 380 Mass. at 914. There must be a connection or nexus between the mental illness and the risk of serious harm; the likely harm must be the result of the mental illness. *See Addington v. Texas*, 441 U.S. 418, 426 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975); *Foucha v. Louisiana*, 504 U.S. 71, 78 (1992); Mass. G. Evid. § 1117(a) (2019); Dist. Ct. Standard 2:00. The risk of harm must be to the physical wellbeing of the client or of others. Evidence of damage to property is insufficient to support commitment.

To prove the first type of serious harm (substantial risk of danger to self), the petitioner must present "evidence of, threats of, or attempts at, suicide or bodily harm." G.L. c. 123, § 1; *In the Matter of G.P.*, 473 Mass. 112, 125 (2015). To prove the second type of serious harm (substantial risk of danger to others), the petitioner must present "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." G.L. c. 123, § 1; *In the Matter of G.P.*, 473 Mass. at 126. To prove the third type of serious harm (very substantial risk of physical impairment or injury resulting from an inability to care for one's self), the petitioner must present "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; *see also In the Matter of G.P.*, 473 Mass. at 128–29. Merely a decline in the client's mental health will not suffice to establish this criterion.

Neither the statute nor Massachusetts case law specifies how recent the episodes of violence or threats need to be in order for the court to make the requisite finding. While a recent manifestation of dangerous behavior is clearly relevant, it is not a requisite element of proof. *Commonwealth v. Rosenberg*, 410 Mass. 347, 363 (1991) (no requirement that petitioner prove likelihood of serious harm with evidence of recent, overt, dangerous act). However, the more recent the evidence supporting a likelihood of serious harm, the more weight that evidence should carry. *In the Matter of G.P.*, 473 Mass. at 125–26. Regardless, the court must find, beyond a reasonable doubt, that there is an imminent danger of harm. *Acting Superintendent of Bournewood Hosp. v. Baker*, 431 Mass. 101, 105 (2000); *Commonwealth v. Nassar*, 380 Mass. 908, 917 (1980). The imminence of the anticipated harm is at least somewhat dependent on the severity of such harm. *Commonwealth v. Nassar*, 380 Mass. at 917. Imminence means "in days or weeks rather than in months." *In the Matter of G.P.*, 473 Mass. at 128.

The court is not required to find that the client will engage in acts of self-harm or harm to others, or will be harmed if discharged. Rather, the court must be convinced, beyond a reasonable doubt, that there is a substantial likelihood that the person will cause harm or a very substantial likelihood of injury due to an inability to protect themselves in the community.

§ 3.4.5 Least Restrictive Alternative

The trial court must consider "all possible alternatives to continued hospitalization." *Commonwealth v. Nassar*, 380 Mass. at 918; *see Gallup v. Alden*, 57 Mass. App. Dec. 41 (1975). Two possibilities present themselves. The petitioner is likely to claim that only confinement at a facility is *appropriate*; that a mental health facility is the only setting in which the client can be safely and appropriately treated. If the court finds this to be so, beyond a reasonable doubt, the inquiry need go no further. *Siddell v. Marshall*, 1987 Mass. App. Div. 8 (psychiatrist's uncontroverted opinion that hospitalization was only appropriate treatment setting sufficient to support finding that no less restrictive alternative available).

Alternatively, the petitioner may argue that while a less restrictive setting may be appropriate, that option is not currently *available*. If this is the case, the petitioner must present evidence as to the efforts made to locate and secure placement in an appropriate treatment setting outside the facility. Such efforts should not be limited to placements solely within the facility's catchment area. Counsel should cross-examine the petitioner's witness about what options beyond arbitrary, administratively determined geographic areas have been pursued; if they have not, counsel should move for a dismissal of the petition. The court may decide only whether hospitalization is required. It may not order commitment to outpatient or community-based settings.

Counsel should argue that the petition must be denied if the confinement is sought only because the Commonwealth does not maintain a full range of treatment options in the community. While such an argument should, perhaps, be compelling, the trial courts have not yet agreed on this matter. The U.S. Supreme Court held that unjustified isolation of those suffering from mental illness is properly regarded as discrimination based on disability. *Olmstead, Comm'r, Ga. Dep't of Human Res., Petitioners v. L.C. ex rel. Zimring*, 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999). The state is required to provide appropriate community-based treatment, unless doing so would fundamentally alter the state's ability to provide services to its residents with disabilities. In determining whether such a fundamental alteration would be the result of an order, a court "must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably." *See Randall R. v. Dep't of Developmental Servs.*, 84 Mass. App. Ct. 1110 (2013) (right to live in least restrictive and most typical environment requires DDS to place intellectually disabled resident in community if clinically appropriate and desired).

The least restrictive alternative doctrine is especially applicable where the petitioner seeks commitment to the Bridgewater State Hospital, pursuant to G.L. c. 123, § 15(e), 16(b), 16(c), or 18. Thus, a male client may be confined at Bridgewater only if the court finds, beyond a reasonable doubt, that he could not be appropriately and safely treated at a DMH facility or, in the case of proceedings under Section 18, a DMH facility or a penal facility, and that the strict security of a correctional facility is necessary. If the court finds that the requirements for commitment to Bridgewater have not been met, but that the criteria for commitment to a mental health facility have been

established, the client will be committed to a facility designated by DMH. G.L. c. 123, § 8(b). In such circumstances, DMH must provide the level of security necessary to confine and treat the client. *Bradley v. Comm'r of Mental Health*, 386 Mass. 363 (1982). Where commitment has been sought by the director of a place of detention, however, a male prisoner may be confined at Bridgewater, despite the court's having found that the need for strict security has not been established beyond a reasonable doubt, if the court finds him to be committable and the commissioner of correction certifies that such confinement is necessary to "insure his continued retention in custody." G.L. c. 123, § 18(a).

§ 3.5 DISPOSITION

The court must render its decision within ten days of the completion of the trial, unless the time period is extended by the administrative justice of the District Court Department. G.L. c. 123, § 8(c). In most instances, the court will render its decision at the completion of the trial.

§ 3.5.1 Length of Commitment Orders

The first order of commitment is valid for six months, while any subsequent, consecutive commitment will be valid for one year. G.L. c. 123, § 8(d). Except where the client is also a defendant in a criminal proceeding or has been found not guilty by reason of mental illness or defect, and has been committed to the facility pursuant to G.L. c. 123, § 16, or has been committed pursuant to G.L. c. 123, § 15(e) after having been found guilty of a criminal charge, or has been committed to the facility from a place of detention pursuant to G.L. c. 123, § 18, the superintendent must discharge the person if the person is no longer in need of inpatient care. G.L. c. 123, § 4. The facility need not notify the court of the discharge.

Where a person is also a defendant in a criminal proceeding, or has been found not guilty by reason of mental illness or defect, the superintendent must notify the court and the prosecuting district attorney of any plan to discharge the client or of a decision not to petition for recommitment. Within thirty days of the receipt of the notice, the district attorney may petition for the recommitment. The respondent must remain at the facility during this thirty-day period and will continue to be held, pending trial, if a petition is filed. G.L. c. 123, § 16(e). As with all other time periods established under G.L. c. 123, a court may not hear a district attorney's petition filed after the expiration of this thirty-day period.

Any charges pending against a defendant who has been found incompetent to stand trial must be dismissed on the parole eligibility date. This date is calculated based on the maximum sentence the defendant would receive if convicted of the most serious crime charged. The charges can be dismissed at any time in the interest of justice. G.L. c. 123, § 16(f); *see Sharris v. Commonwealth*, 480 Mass. 586 (2018) (substantive due process requires dismissal of a criminal charge where a defendant will never regain competency and maintaining the charge does not serve the compelling state interest of protecting the public). The dismissal of charges upon the parole eligibility date must

occur without regard to the defendant's current commitment to a mental health facility. *Foss v. Commonwealth*, 437 Mass. 584 (2002).

If a person has been found to be incompetent to stand trial, is committed pursuant to G.L. c. 123, § 16, and the criminal charges are dismissed, the order of commitment does not terminate; the order of commitment continues for the balance of the term. When the Section 16 order of commitment expires, the former defendant can be re-committed pursuant to G.L. c. 123, §§ 7 and 8. *See generally In the Matter of E.C.*, 479 Mass. 113 (2018); *see also In re C.B.*, 2013 Mass. App. Div. 42.

§ 3.5.2 Practice Advisory

While generally commitment orders are valid for up to six months or one year, the court can order a shorter period if the evidence shows that the client is likely to improve within the shorter period. Through cross-examination of the facility's witnesses or direct examination of an independent clinician, counsel should elicit an estimate of the reasonable length of hospitalization likely to be required for the client to improve sufficient to be released; if appropriate, counsel should move for a shorter commitment period. If a court is not willing to order a shorter commitment period, counsel can request an interim judicial review. While judicial reviews are not provided for in the statute, many courts allow them as part of the court's inherent authority to insure that constraints on a person's liberty last no longer than necessary. Courts may be particularly inclined to schedule a judicial review if there has been testimony indicating that the respondent may be capable of being discharged prior to the expiration of the commitment.

§ 3.5.3 Treatment and Restrictions within the Facility

General Laws c. 123 limits the District Court's authority in a commitment proceeding to ordering the client's commitment or discharge. Excepting treatment orders pursuant to G.L. c. 123, § 8B, the court may not order a specific treatment regime or commitment at a particular facility. *Bradley v. Comm'r of Mental Health*, 386 Mass. 363 (1982). The court may not restrict the client's movements within a facility, unless the client is also a defendant in a criminal proceeding or has been found not guilty by reason of mental illness or defect, in which case the court may restrict the client to the buildings and grounds of the facility, but not within the facility. G.L. c. 123, § 16(e); *Commonwealth v. Carrara*, 58 Mass. App. Ct. 86 (2003). Should the superintendent wish to remove or modify such restrictions, the court must be notified of any plans to do so. The restrictions may be removed or modified unless the court objects, in writing, within fourteen days. G.L. c. 123, § 16(e).

Clients may be transferred between facilities pursuant to G.L. c. 123, § 3. All such decisions are within the discretion of the facility and DMH, and should be based on the client's clinical needs.

§ 3.6 APPEAL OR REVIEW OF COMMITMENT ORDERS

There are two procedures by which an order of commitment may, in the first instance, be reviewed.

Matters of law, including evidentiary rulings, may be appealed to the Appellate Division of the District Court or the Appellate Division of the Boston Municipal Court. G.L. c. 123, § 9(a); *see* G.L. c. 231, § 108; Dist./Mun. Ct. R. App. Div. Appeal.

At any time during a period of commitment, a client or anyone on the client's behalf may petition the Superior Court Department to determine whether the criteria for commitment or the administration of medical treatment for mental illness ordered pursuant to G.L. c. 123, § 8B continue to be met. G.L. c. 123, § 9(b). A full trial on the merits will be held. Proceedings under Section 9(b) are not, strictly speaking, appeals. The procedural steps applicable in prosecuting an application for discharge under Section 9(b) are identical to other Superior Court matters, but a prompt trial is required. Along with the application for discharge or revocation of a treatment order, counsel should file a motion seeking funds for an independent clinician, as well as an affidavit of indigency and related forms.

In a proceeding under Section 9(b), the petitioner bears the burden of proving by "a fair preponderance of the evidence that his situation has significantly changed since last his confinement was reviewed judicially, whether on the basis of new factual developments or new evidence, so as to justify his discharge or transfer [from Bridgewater to a DMH facility]." *Andrews, petitioner*, 449 Mass. 587 (2007). Trial counsel should immediately notify CPCS of the filing of an appeal under G.L. c. 123, § 9(a) or a petition under G.L. c. 123, § 9(b), so that appellate counsel can be assigned.