

UNIFORM TRIAL COURT RULES
for
CIVIL COMMITMENT PROCEEDINGS
for
ALCOHOL AND SUBSTANCE ABUSE
G.L. c. 123, § 35

Rule 1. Commencement of proceedings

(a) Proceedings under the provisions of G.L. c. 123, § 35 in the District Court, Boston Municipal Court, and Juvenile Court Departments shall be commenced by the filing of a written petition, signed under the pains and penalties of perjury, by a police officer, physician, spouse, blood relative, guardian, or court official seeking the issuance of an order of commitment of a person (hereinafter the “respondent”) who the petitioner has reason to believe is an alcoholic or substance abuser, as those terms are defined in G.L. c. 123, § 35. Proceedings may also be commenced by a written petition by a respondent seeking an order committing the respondent.

(b) Proceedings may be commenced in any of the three Departments without regard to the age of the respondent, but the age of the respondent may determine to which Department any warrant or summons will be returnable pursuant to Rule 3.

(c) Following commencement, a petition may not be withdrawn without leave of court.

Rule 2. Scheduling of hearing; review of petition

Upon the filing of a petition and any sworn statements the court may request from the petitioner at the time of such filing, the case shall be brought immediately before a judge who shall review the petition. If the judge determines that either (1) the petitioner is statutorily unqualified to file a petition under the provisions of G.L. c. 123, § 35, or (2) the petitioner’s allegation that the respondent is an alcoholic or substance abuser has no reasonable basis, the judge shall dismiss the case. Otherwise, if the respondent is present, the court shall immediately proceed in accordance with Rules 4 and 5. If the respondent is not present, the court shall immediately proceed in accordance with Rule 3.

Rule 3. Issuance of warrant or summons; execution of warrant

(a) If the judge determines that there are reasonable grounds to believe that the respondent will not appear at the hearing and that any further delay in the proceeding would present an immediate danger to the physical well-being of the respondent, the court may cause a warrant to issue for the apprehension and appearance of the respondent.

(b) If the court does not issue a warrant pursuant to Rule 3(a), the court shall cause a summons and a copy of the petition to be 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 well-being of the respondent.

(c) A warrant issued under this rule shall be effective for no more than one week and shall provide that it may be executed only when the respondent may be presented immediately after apprehension before a judge pursuant to Rule 4 or Rule 10.

(d) If the respondent is eighteen years or older and the case is commenced in the Juvenile Court Department, the judge may, in the exercise of discretion, make the warrant or summons returnable to an appropriate court in the District Court Department or the Boston Municipal Court Department. The clerk shall notify the return court of the warrant and summons and transmit the papers listed in Rule 10(a) to the return court.

(e) If the respondent is under the age of eighteen years old and the case is commenced in the District Court Department or the Boston Municipal Court Department, the judge may, in the exercise of discretion, make the warrant or summons returnable to an appropriate court in the Juvenile Court Department. The clerk shall notify the return court of the warrant and summons and transmit the papers listed in Rule 10(a) to the return court.

Rule 4. Appointment of counsel

Unless the respondent is represented by counsel, the court shall appoint counsel pursuant to Supreme Judicial Court Rule 3:10(1)(f)(iii) before or upon the respondent's appearance before the court.

Rule 5. Order for examination

The judge shall order an examination of the respondent to be conducted by a qualified physician, a qualified psychologist, or a qualified social worker.

Rule 6. Conduct of the hearing; standard of proof

(a) After the completion of the examination ordered under Rule 5, the judge shall hold a hearing to determine whether there is clear and convincing evidence that (1) the respondent is an alcoholic or a substance abuser, as defined in G.L. c. 123, § 35; and (2) there is a likelihood of serious harm, as defined in G.L. c. 123, § 1, as a result of the respondent's alcoholism or substance abuse, to the respondent, the petitioner, or any other person.

(b) The respondent shall have the right to cross-examine witnesses, present independent expert evidence, call witnesses, and submit documents or other evidence.

(c) All testimony shall be taken under oath and shall be recorded or transcribed.

Rule 7. Evidence

(a) The rules of evidence shall not apply in proceedings under G.L. c. 123, § 35, except that privileges and statutory disqualifications shall apply. Hearsay evidence shall be admissible, but may be relied upon only if the judge finds that it is substantially reliable.

(b) The judge shall not draw any adverse inference from a respondent's refusal to testify or to speak during the examination ordered pursuant to Rule 5 or at any other time during the proceedings. This shall not prohibit the clinician conducting the examination from considering such refusal in reaching an opinion or from describing that factor in the clinician's medical testimony to the court.

(c) The court shall base its findings on credible and competent evidence, including medical testimony and such other testimony as may be admitted in evidence.

Rule 8. Finding and issuance of commitment order

(a) If the judge makes the findings required by Rule 6(a), the court may then issue an order of commitment consistent with the terms and requirements set forth in G.L. c. 123, § 35. The order shall specify whether the commitment is based on a finding of alcoholism, substance abuse, or both. The order shall specify that the receiving facility is responsible for providing and maintaining custody of the respondent until expiration or termination of the order, as provided by law.

(b) The judge may include a provision in the order requiring the facility to provide advance notice of the release of the respondent to the court, law enforcement or another agency and to provide the court with notice of any escape by the respondent.

(c) The commitment shall be made to a suitable facility approved by the department of public health for the care and treatment of alcoholism or substance abuse or, if no such facility is suitable and available, to the Massachusetts correctional institution at Bridgewater, for a male respondent, or Framingham, for a female respondent. The facility shall be identified in the commitment order.

(d) Upon issuance of a commitment order, the court shall notify the respondent that the respondent is 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.

Rule 9. Security of respondent

The court shall take such action and issue such orders as may be necessary to secure the presence of the respondent after the respondent's arrival at the court, prior to or during the hearing, and while awaiting transport following the issuance of a commitment order, as the circumstances may require.

Rule 10. Proceedings when a respondent is brought before a court other than the court that issued the warrant

(a) When (1) a warrant or summons is issued pursuant to Rule 3(d) or (e) or (2) a warrant is executed where it is impractical to transport the respondent to the issuing court, the respondent may be brought before a convenient court having jurisdiction of cases under G.L. c. 123, § 35 (hereinafter the "new court"). The new court shall immediately contact the issuing court and obtain copies of (1) the docket in the case; (2) the petition; and (3) any other documents in the case file.

(b) The new court shall open a new case file for the matter and make reasonable efforts to notify the petitioner of the location of the new court. The court, in its discretion, may wait a reasonable time for the petitioner to arrive.

(c) The new court shall proceed to adjudicate the case in accordance with Rules 4 through 9. The new court shall promptly inform the issuing court of its disposition by transmitting to the issuing court a copy of its docket entries.

Rule 11. Appeal

(a) Any person aggrieved by a decision of the District Court Department or the Boston Municipal Court Department may appeal to the Appellate Division of such Department within seven days. Upon request, the Appellate Division shall expedite consideration of any appeal.

(b) Any person aggrieved by a decision of the Juvenile Court Department may appeal to the Appeals Court within seven days. Upon request, the Appeals Court shall expedite consideration of any appeal.

Commentary

These rules provide the provisions of G.L. c. 123, § 35 in a sequential format to clarify and facilitate the conduct of the proceedings they require. The rules make no reference to the respondent’s “mental health,” though the statute is among several others that appear under that heading in the General Laws. The rules also provide a procedural groundwork for the orderly processing of section 35 petitions.

Among the provisions in the rules that are *not* set forth in the statute are the applicable standard of proof, the admissibility of hearsay, and the impermissibility of an inference to be drawn by the court from a respondent’s refusal to speak with a clinician. These three topics were mentioned as matters requiring clarification in *In the Matter of Jennifer Hensley*, SJC Single Justice Opinion (July 23, 2014) (section 35 hearings involve “several important unresolved issues” involving evidence). These issues are addressed in Rules 6 and 7.

Rule 1(a) formalizes an existing practice in the courts of allowing persons to seek their own commitment for substance abuse treatment. Often a probation officer or other court official will serve as petitioner when a substance abuser seeks the assistance of the court in addressing the addiction. This provision, however, preserves the ability of an addict to seek help even when a court official is unavailable to serve as petitioner.

Rule 1(c) recognizes that a section 35 proceeding is not an ordinary civil case terminable by the parties at will, but rather an invocation of the court’s statutory power to protect the respondent, petitioner, and society at large. For this reason, withdrawal of a petition must be approved by a judge and should not be allowed unless the judge is satisfied that such withdrawal will not jeopardize the safety of the respondent, petitioner, or any other person.

Rule 2 contemplates that the judge may be able to decide whether the petition is proper and whether to issue a summons or a warrant on the papers. The judge, in the exercise of discretion, may choose to conduct a hearing on these issues and to inquire further of a petitioner. The absence of the petitioner, whether because the petitioner is a physician still at a hospital or for any other reason, would not be grounds for dismissing the petition.

The last sentence in Rule 3(b) is based on the fact that a finding of “immediate danger” is not a statutory prerequisite for the issuance of a warrant after a respondent has failed to appear on a summons.

The provisions of Rules 3(d) and 3(e) balance the advisability of having section 35 petitions adjudicated by courts accustomed to determining the rights of persons the age of the respondent and the need for prompt disposition of any section 35 petition. Accordingly, when the respondent is present and no warrant or summons is necessary, the court should adjudicate the petition regardless of the age of the respondent to avoid the delays and possible loss of the respondent’s presence that moving the proceeding would cause. Similarly, requiring the initial review and the determination whether to issue a warrant or a summons to be conducted by the court in which the petitioner files avoids unnecessary delays and risks. By contrast, issuing a warrant or summons returnable to another department does not pose the same risks. Whether to do so in a particular case is a matter entrusted to the judge’s discretion. It may be prudent for a Juvenile Court to retain a case involving a young adult or other person with whom the court has experience. Similarly, practical considerations of distance and the availability of useful witnesses may recommend retaining or moving a particular case.

Rule 4 provides the court with flexibility to determine the appropriate time to appoint counsel for an unrepresented respondent. It may be convenient to appoint counsel upon a respondent’s arrest to allow consultation before the respondent is brought before a judge. In any event, however, counsel must be appointed before the court-ordered examination, pursuant to G.L. c. 123, § 35.

Rule 6 imposes a “clear and convincing” standard of proof for these cases because this is the standard required for other temporary detention orders, specifically pretrial detention based on “dangerousness” under G.L. c. 276, § 58A. *See Mendonza v. Commonwealth*, 423 Mass. 771, 782-84 (1996). Because a commitment under G.L. c. 123, § 35 is limited to a maximum duration of ninety days, the procedural protections accorded under G.L. c. 276, § 58A are sufficient to satisfy the requirements of due process.

Similarly, pretrial commitment on the basis of dangerousness is viewed as sufficiently analogous to section 35 proceedings to provide the appropriate basis, consistent with due process requirements, for the provisions in Rule 7 regarding the admissibility and use of hearsay evidence. Although most evidentiary rules are relaxed for section 35 proceedings, all privileges and statutory disqualifiers apply. Accordingly, for example, strict compliance with rules regarding the waiver of privileges from the clinician-patient relationship, particularly those set forth in *Commonwealth v. Lamb*, 365 Mass. 265, 270 (1974), is necessary. Despite the relaxed evidentiary rules, the judge may rely upon only evidence, whether hearsay or otherwise, that is substantially reliable. Substantially reliable hearsay has been held to be a proper basis for other detention decisions, such as detention for dangerousness, *Abbott A. v. Commonwealth*, 458 Mass. 24, (2010), and revocation of probation, *Commonwealth v. Bukin*, 467 Mass. 516, 522 (2014).

Although there is no constitutional prohibition on drawing an adverse inference from a civil respondent's invocation of a right against self-incrimination or other refusal to talk, *Soe v. Sex Offender Registry Bd.*, 466 Mass. 381, 388-89 & n.8 (2013), the probative value of such refusal in the context of a respondent alleged to be an alcoholic or substance abuser is minimal when unsupported by competent medical expert testimony. *Cf. Commonwealth v. Gagnon*, 408 Mass. 185, 197-98 (1990) (invocation of privilege against self-incrimination before the jury by a witness in a criminal case would invite uninformed speculation). These rules, however, are not intended to interfere with a qualified clinician's exercise of the clinician's medical judgment. Accordingly, the clinician may base an opinion on any medically-appropriate grounds and describe those grounds to the court. Although the judge may not independently draw an adverse inference from the respondent's failure to cooperate, a clinician's opinion should not be rejected or discounted because the clinician considered the respondent's failure to cooperate, assuming that such consideration was medically sound.

Rule 8 does not set forth the specific terms required to be included in commitment orders issued under G.L. c. 123, § 35. Those terms are set forth in the official commitment order form. Regarding those terms, the statute provides as follows:

[T]he court may order such person to be committed for a period not to exceed 90 days, followed by the availability of case management services provided by the department of public health for up to 1 year; provided, however, that a review of the necessity of the commitment shall take place by the superintendent on days 30, 45, 60 and 75 as long as the commitment continues. A person so committed may be released prior to the expiration of the period of commitment upon written determination by the superintendent that release of that person will not result in a likelihood of serious harm. Such commitment shall be for the purpose of inpatient care in public or private facilities approved by the department of public health under chapter 111B for the care and treatment of alcoholism or substance abuse. The person may be committed to the Massachusetts correctional institution at Bridgewater, if a male, or at Framingham, if a female, if there are not suitable facilities available under said chapter 111B; provided, however, that the person so committed shall be housed and treated separately from convicted criminals. Such person shall, upon release, be encouraged to consent to further treatment and shall be allowed voluntarily to remain in the facility for such purpose. The department of mental health, in conjunction with the department of public health, shall maintain a roster of public and private facilities available, together with the number of beds currently available, for the care and treatment of alcoholism or substance abuse and shall make the roster available to the district courts on a monthly basis.

Rule 8(a) also includes a provision intended to eliminate any doubt that a commitment order issued under Section 35 requires that the receiving facility must hold

the respondent in custody for the duration of the commitment, unless terminated by the facility's superintendent pursuant to the procedure set forth in G.L. c. 123, § 35.

Rule 8(b) allows the judge to include a provision in a commitment order requiring the receiving facility to provide advance notice of the release of the respondent, whether to the court, law enforcement, or another agency. Where a respondent is subject to other process, such as an order of detention in a criminal case, the advance notice will allow law enforcement to take custody of the respondent or to transport a respondent to court to address such issues. The rule also permits the judge to include a provision requiring the facility to notify the court if the respondent escapes from custody. Such notification permits the court to determine whether further action is advisable, such as the issuance of a warrant for apprehension.

Rule 9 regarding security is intended to address those situations in which a respondent may present a risk of flight or harm, given the fact that the respondent may be before the court unwillingly and/or may be suffering from the effects of alcohol or drugs resulting in unpredictable, aggressive, or violent behavior.

The law provides the court, as a matter of its inherent power, with broad discretion regarding security in the courtroom, including controlling the behavior of those before the court, when necessary. The Supreme Judicial Court has stated:

Of necessity, a judge's inherent powers must encompass the authority to exercise "physical control over his courtroom." *Chief Admin. Justice of the Trial Court v. Labor Relations Comm'n*, 404 Mass. 53, 57 (1989). As we noted in *Chief Admin. Justice of the Trial Court v. Labor Relations Comm'n*, "[t]he power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court is a power absolutely necessary for a court to function effectively and do its job of administering justice." *Id.* at 57, quoting *State v. LaFrance*, 124 N.H. 171, 179-180 (1983).

Commonwealth v. O'Neil, 418 Mass. 760, 764 (1994).

Rule 10 governs the procedure when a respondent is apprehended far enough away from the issuing court that transportation to that court before court closes is not practical. In such circumstances, law enforcement may bring the respondent to any convenient court, and the matter will be adjudicated there as if the case had arisen there. This may cause issues with the petitioner's ability to arrive at the new court in a reasonable amount of time, and the use of remote testimony or the receipt of hearsay evidence may be appropriate to balance the need for dispatch with the desire for the petitioner's participation.

Rule 11 clarifies that, pursuant to G.L. c. 123, § 9(a), any party may appeal a section 35 determination to the appropriate Appellate Division or, in the case of the Juvenile Court, to the Appeals Court. Because a section 35 commitment cannot last longer than ninety days, a short time limit for filing a notice of appeal and a requirement

of expediting the appeal upon request are necessary to avoid the appeal from becoming moot.

Helpful information regarding the conduct of Section 35 commitment proceedings can be found in the Benchbook for District Court Judges, Proceedings Under Massachusetts General Laws Chapter 123 (2011), published by the Judicial Institute, at pages 228-234. The Benchbook provides sources of clinical information relevant to the definitions of “alcoholic” and “substance abuser” and clinical criteria relevant to the determination of the “likelihood of serious harm.” It also provides information on the availability of placements to assist the court when a commitment order is issued. It should be noted that the version of G.L. c. 123, § 35 that appears in the Benchbook was amended following its publication.