

# Section 35

DEFENSE ATTORNEY PERSPECTIVE

# By the Numbers:

- ▶ CPCS is responsible for providing counsel to everyone facing a § 35 commitment petition –
  - ▶ Right to counsel
  - ▶ SJC Rule 3:10 provides that everyone facing civil commitment under chapter 123 is presumptively entitled to counsel
  - ▶ Counsel provided by
    - ▶ Total Number of Private Attorneys for all Divisions (Public Defender Division, Mental Health Litigation Division, Youth Advocacy Division, and Child and Family Law Division)  
= 2600 certified by various divisions
    - ▶ Public Defenders (Public Defender Division, Mental Health Litigation Division, Youth Advocacy Division, and Child and Family Law Division)  
= 400 employed in trial offices

# Section 35 Commitment - Cases

- ▶ FY 18
  - ▶ **Section 35 Assignments to Private Counsel = 5359**
  - ▶ **Section 35 Assignments to Public Counsel = 603**
  - ▶ **Total § 35 cases assigned to public and private counsel = 5962**
  - ▶ Total of all Mental Health Assignments **12,209** (includes public, private, chapter 123 civil commitments and chapter 190B guardianship cases)
  - ▶ **Nearly one-half (48.8%) of mental health cases were §35 commitments**
- ▶ FY 19 (Through mid-April 2019)
  - ▶ **Section 35 Assignments to Private Counsel = 3731 (est. FY 4712)**
  - ▶ **Section 35 Assignments to Public Counsel = 262 (est. FY 332)**
  - ▶ **Total § 35 cases assigned to public and private counsel = 3993 (est. FY 5044)**
  - ▶ Total Mental Health Assignments **8903 (est. FY 11,246)**
  - ▶ **Drop in percentage of mental health cases to 44.8% were §35 commitments**

# Section 35 Commitment – Cases

## Numbers of Attorneys

- ▶ FY 18
  - ▶ Private attorneys = 1129
  - ▶ Public Defenders = 132
  - ▶ Total Attorneys = 1261
  - ▶ From 1-129
- ▶ FY 19
  - ▶ Private attorneys = 1082
  - ▶ Public Defenders = 85
  - ▶ Total Attorneys = 1167
  - ▶ From 1-20

# Section 35 Commitment – 2018

## 70 Courts - Ranging from 2 – 410

1	LOWELL DISTRICT COURT	410
2	SPRINGFIELD DISTRICT COURT	387
3	NEW BEDFORD DISTRICT COURT	256
4	WORCESTER DISTRICT COURT	233
5	QUINCY DISTRICT COURT	198
6	BROCKTON DISTRICT COURT	192
7	PLYMOUTH DISTRICT COURT	190
8	WOBBURN DISTRICT COURT	186
9	BMC - WEST ROXBURY	175
10	FALL RIVER DISTRICT COURT	167

11	TAUNTON DISTRICT COURT	167
12	CENTRAL BERKSHIRE DISTRICT COURT	145
13	LAWRENCE DISTRICT COURT	144
14	WAREHAM DISTRICT COURT	138
15	BARNSTABLE DISTRICT COURT	135
16	LYNN DISTRICT COURT	130
17	CHELSEA DISTRICT COURT	102
18	BMC - Dorchester	98
19	FALMOUTH DISTRICT COURT	87
20	GREENFIELD DISTRICT COURT	83

# Boston – BMC – Ranks 3<sup>rd</sup> Overall

BMC - BRIGHTON	8
BMC - WEST ROXBURY	175
BMC - DORCHESTER	98
BMC - CENTRAL	40
BMC - CHARLESTOWN	11
BMC - ROXBURY	10
BMC - EAST BOSTON	4
BMC - SOUTH BOSTON	3
BMC - TOTAL	349

# Section 35 Commitment – 2019

## 70 Courts - Ranging from 1 – 283

LOWELL DISTRICT COURT	283
SPRINGFIELD DISTRICT COURT	195
NEW BEDFORD DISTRICT COURT	170
BMC - WEST ROXBURY	168
WORCESTER DISTRICT COURT	153
LAWRENCE DISTRICT COURT	137
QUINCY DISTRICT COURT	128
FALL RIVER DISTRICT COURT	124
PLYMOUTH DISTRICT COURT	122
BROCKTON DISTRICT COURT	120

BARNSTABLE DISTRICT COURT	102
TAUNTON DISTRICT COURT	95
WAREHAM DISTRICT COURT	94
WOBBURN DISTRICT COURT	94
CENTRAL BERKSHIRE DISTRICT COURT	91
LYNN DISTRICT COURT	83
HOLYOKE DISTRICT COURT	81
PALMER DISTRICT COURT	73
FALMOUTH DISTRICT COURT	72
ATTLEBORO DISTRICT COURT	64

# How do defense attorneys get involved?

- ▶ Petition filed
- ▶ Client arrested
- ▶ Attorney assigned
- ▶ Attorney, client interview
- ▶ Possible attorney, client, clinician interview
- ▶ Discovery: find out clinician's recommendation and why
- ▶ Hearing
- ▶ Possible appeal



# Most hectic hearing we do.

- ▶ Little time to prepare
- ▶ Assigned on duty days, while also handling bails
- ▶ Sometimes assigned multiple section cases in one day
- ▶ No access to client's records, experts, fact witnesses
- ▶ However, "The uniform § 35 rules afford the respondent—who is entitled under § 35 to be represented by counsel and to have counsel immediately appointed if indigent—the right to cross-examine witnesses, to call witnesses (and therefore to testify), and to present independent expert and other types of evidence."

In re G.P., 473 Mass. 112, 121 (2015)

# Why present a defense?

- ▶ Ethical duties of a lawyer
  - ▶ Present a zealous defense within the bounds of the law
  - ▶ Accept the client's right to choose treatment
  - ▶ Commitment to protect the due process rights of the respondent
  - ▶ What is at stake:
    - ▶ INDIVIDUAL RIGHT TO DUE PROCESS & LIBERTY
    - ▶ CONSTITUTIONAL RIGHT TO REFUSE MEDICAL TREATMENT
- ▶ The process:
  - ▶ Determine the client's wishes
  - ▶ Investigate the claims as best we can
  - ▶ Ensure that the process which is due is followed
  - ▶ Hold the petitioner to the burden of proof – clear and convincing

# Ethical Duty to Client

- ▶ The defense attorneys are the only brakes in the system
  - ▶ Cannot substitute our wishes for the client's wishes
  - ▶ Not governed by “what is best for the client” who is competent to make even a bad decision
  - ▶ Must attempt to achieve client's desired result within bounds of law and ethics
  - ▶ Challenge the evidence
    - ▶ Some respondents do not meet one or both prongs to justify commitment
  - ▶ Require proof

# Queries that need to be answered:

- ▶ Does this process help?
  - ▶ Concerns raised by those who have been through the system
  - ▶ Risk of opioid-related death following incarceration >50x greater than general public
  - ▶ Fatal overdoses during first month after release 6x higher than for all other post-incarceration periods. Chapter 55 Report.
  - ▶ Average length of section 35 commitment in 19-22 days
    - ▶ Is this more than a detox period – what is the available follow-up
  - ▶ “Clients who received involuntary treatment were 2.2 times as likely to die of opioid-related overdoses and 1.9 times as likely to die of any cause compared to those with a history of voluntary treatment only.” Chapter 55 Report, pg. 49.

# The standard.

- ▶ Clear and convincing evidence:
  - ▶ Facts establishing a likelihood of serious harm are highly probably true or
  - ▶ The probability they are true is substantially greater than that they are false
- ▶ Rules of Evidence do not apply – opens the door for hearsay
- ▶ Evidence of risk:
  - ▶ The more recent, the more probative
  - ▶ More serious, more significant
  - ▶ a showing of imminence is required—that is, the petitioner must demonstrate a substantial *and* imminent risk of serious injury to the respondent or to others on account of the respondent's alcohol or substance abuse, or both.
  - ▶ what must be shown is a substantial risk that the harm will materialize in the reasonably short term—in days or weeks rather than in months

In re G.P., 473 Mass. 112, 127-8 (2015)

# Holding to the standard is hard.

- ▶ Lack of truly adversarial hearing
  - ▶ Judges tasked with developing the facts, not just deciding the outcome
    - ▶ Defense attorneys ethically can't do this for them
- ▶ Understandable sympathy for layperson petitioner = may create lowered expectations for evidence
- ▶ Unprepared and unrepresented petitioners may present vague, & contradictory statements

# Holding to the standard is hard.

- ▶ Slow & cumbersome appeals process
  - ▶ Numerous motions, memo, notice, transcript all usually required prior to first appeal
  - ▶ Appellate Division usually handles civil appeals where liberty not at stake
  - ▶ Best case: 2 weeks for first round hearing,
  - ▶ More common: a month, sometimes much longer
    - ▶ The client has almost always been released by the time the first appeal is heard
    - ▶ None of the cases are moot

# Challenges

- ▶ Parties are usually new to the clinician. No prior interview of the petitioners or the respondents.
- ▶ 10 – 20 minute interview of the petitioners,
- ▶ possibly the same with respondent
- ▶ Court clinician has to determine who to believe and then reach a clinical decision about committability
- ▶ There is likely no outside evidence
- ▶ Hearing can be a simple credibility contest filtered through a court clinician
- ▶ Our general advice to clients is to not speak to the clinician if they do not want to be committed.



# The importance of due process: potential for bias.

- ▶ Clinician testifying about what the petitioner says:

- ▶ “petitioner tells me”
- ▶ “they believe”
- ▶ “they have found”
- ▶ “mother states”

- ▶ Clinician testifying about what the respondent says:

- ▶ “according to *her*”
- ▶ “she claims”
- ▶ “I find that she contradicted herself a few times, she was very vague in responding to me. I don’t know how much she’s using, but, in my clinical opinion, she’s using.”

# Voluntary respondents...

- ▶ Are taken into custody and held in lockup until the hearing.
- ▶ The law:
  - ▶ Before a court can order a warrant for an individual under Section 35, it must find that there are “reasonable grounds to believe that such person will *not appear* and that any further delay in the proceedings would present an immediate danger to the physical well-being of the respondent.” Uniform Rules for Civil Commitment Proceedings for Alcohol and Substance Use Disorders, Rule 3, emphasis added
  - ▶ Judge has discretion to secure the respondent “as the circumstances may require.” Rule 9
- ▶ Is it within the purview of this Commission to make recommendations on this or other rules and procedures

# Other areas of concern: Time to Prepare

- ▶ Currently, no realistic option for a continuance.
  - ▶ Respondents have no means of obtaining records or witnesses on their behalf when there's no option between liberty and commitment.
  - ▶ Where will the respondents be held during the continuance?

# Other areas of concern:

## Delay in appeal/motion to reconsider

- ▶ Motion to reconsider is an option:
  - ▶ if the emergency nature of [the proceeding] make a continuance inappropriate, the judge can deny the continuance request but invite a motion for reconsideration of a commitment order supported by expert testimony.
  - ▶ In re G.P., 473 Mass. 112, 122 (2015)
- ▶ Dependent on availability of original judge

# Other areas of concern: Special conditions

- ▶ Clients with special conditions (e.g. pregnancy, HIV): are court clinicians qualified to opine? Are the facilities qualified to treat?
  - ▶ Cannot expect a criminal defense attorney to have the knowledge on hand to challenge the clinician/facility. In criminal case, attorney would have time to investigate the medical claims and hire an expert if necessary.

# Other areas of concern:

## Access to committed clients.

- ▶ Accessing clients after they're held can be incredibly hard.
- ▶ MASAC much more of a challenge than DPH programs
- ▶ There should be a provision similar to DMH facilities:
  - ▶ to receive at any reasonable time, or refuse to receive, visits and telephone calls from a client's attorney . . . even if not during normal visiting hours and regardless of whether such person initiated or requested the visit or telephone call.
  - ▶ The person's attorney . . . shall have access to the client and, with such client's consent, the client's record, the facility staff responsible for the client's care and treatment and any meetings concerning treatment planning or discharge planning where the client would be or has the right to be present . . ." Ch. 123, sec. 23(e)

# Defense attorney access to clients is important.

- ▶ Necessary for appeal/motion to reconsider
- ▶ Pending criminal charge/probation violation hearing—completion of treatment is often significant factor
  - ▶ Could mean the difference between jail or prison and probation or even a CWOF

**Ann Grant**

CPCS Staff Attorney – New Bedford

[agrant@publiccounsel.net](mailto:agrant@publiccounsel.net)

**Jessica Gallagher**

CPCS Staff Attorney – Boston

[jgallagher@publiccounsel.net](mailto:jgallagher@publiccounsel.net)

**Mark Larsen**

Director Mental Health Litigation Division – Boston

[mlarsen@publiccounsel.net](mailto:mlarsen@publiccounsel.net)