

**Supreme Judicial Court  
Standing Advisory Committee on the  
Rules of Criminal Procedure**

**Proposed amendments to Rule 45**

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**[Current text of Mass. R. Crim. P. 45]**

**Rule 45: Removal of the disruptive defendant**

**(a) Removal of defendant**

Upon the direction of the trial judge, a defendant may be removed from the courtroom during his trial when his conduct has become so disruptive that the trial cannot proceed in an orderly manner. Gagging or shackling may be employed if the trial judge has found such restraint reasonably necessary to maintain order. If the trial judge orders such restraint, he shall enter into the record of the case the reasons therefor. Whenever physical restraint of a defendant or witness occurs in the presence of the jury trying the case, or whenever the defendant is removed, the judge, at the request of the defendant, shall instruct the jury that such restraint or removal is not to be considered in assessing the proof and determining guilt.

**(b) Defendant's rights after removal**

A defendant once removed shall be required to be present in the court building while the trial is in progress. At the time of his removal he shall be advised that he has the right to be returned to the courtroom upon his request and assurances of good behavior. Notwithstanding the failure of

a defendant to request to be returned to the courtroom, he shall be returned to the courtroom at appropriate intervals in the absence of the jury, and shall be advised in open court that he will be permitted to remain upon the giving of assurances of good behavior.

**[Proposed text of new Mass. R. Crim. P. 45 - redline version]**

**Rule 45: ~~Removal of the d~~Disruptive defendant.**

**(a) Removal of defendant**

~~Upon the direction of the trial judge, A judge may direct that~~ a defendant may be removed from the courtroom during ~~his trial~~ if the defendant's behavior when his conduct has becomes so disruptive that the trial cannot proceed in an orderly manner. ~~Gagging or shackling may be employed if the trial judge has found such restraint reasonably necessary to maintain order. If the trial judge orders such restraint, he shall enter into the record of the case the reasons therefor. Whenever physical restraint of a defendant or witness occurs in the presence of the jury trying the case, or whenever the defendant is removed, the judge, A~~ at the request of the defendant, the judge shall instruct the jury that ~~such restraint or~~ removal is not to be considered by the jury in assessing the proof and determining guilt.

**(b) Absence of defendant.**

(i) By defendant's request. If a defendant in custody refuses to be brought into the courtroom or requests to be absent from the courtroom, the trial may proceed without the defendant's presence, in the discretion of the judge.

(ii) Based on prior conduct. If the defendant's prior actions provide a substantial basis for the judge to believe that the defendant's behavior will be so disruptive that the trial cannot proceed in an orderly manner, the judge may request an assurance of good behavior from the defendant. If the defendant declines to provide an assurance of good behavior, the trial may proceed without the defendant's presence, in the discretion of the judge.

**(c) Rights of defendant's rights after removal.**

A defendant ~~absent from trial under this rule~~ once removed shall be required to be present in the court building while the trial is in progress. At the time of his removal he shall be advised that the defendant will be admitted he has the right to be returned to the courtroom upon his request and assurances of good behavior. ~~Notwithstanding the failure of a defendant to request to be returned to the courtroom, he shall be returned to the courtroom at appropriate intervals in the absence of the jury, and shall be advised in open court that he will be permitted to remain upon the giving of assurances of good behavior.~~ Whenever possible, the defendant shall be provided with the means to contemporaneously hear or view the proceedings remotely.

**[Proposed text of new Mass. R. Crim. P. 45 – clean version]**

**Rule 45: Disruptive defendant.**

**(a) Removal of defendant**

A judge may direct that a defendant may be removed from the courtroom during trial if the defendant's behavior becomes so disruptive that the trial cannot proceed in an orderly manner. At the request of the defendant, the judge shall instruct the jury that removal is not to be considered by the jury.

**(b) Absence of defendant.**

**(i) By defendant's request.** If a defendant in custody refuses to be brought into the courtroom or requests to be absent from the courtroom, the trial may proceed without the defendant's presence, in the discretion of the judge.

**(ii) Based on prior conduct.** If the defendant's prior actions provide a substantial basis for the judge to believe that the defendant's behavior will be so disruptive that the trial cannot proceed in an orderly manner, the judge may request an assurance of good behavior from the defendant. If the defendant declines to provide an assurance of good behavior, the trial may proceed without the defendant's presence, in the discretion of the judge.

**(c) Rights of defendant.**

A defendant absent from trial under this rule shall be advised that the defendant will be admitted to the courtroom upon request and assurances of good behavior. Whenever possible, the defendant shall be provided with the means to contemporaneously hear or view the proceedings remotely.

**DRAFT Reporter's Notes—2022**

This rule sets forth the procedures by which a judge may remove a defendant from trial because of the defendant's disruptiveness. The rule first became effective in 1979, and these amendments bring it into conformity with the procedures in the overwhelming majority of jurisdictions that address the matter and the current experience of Massachusetts courts with remote participation. The changes from the prior rule are 1) the elimination of references to shackling or gagging a disruptive defendant, 2) the addition of a provision for the corollary problem of a defendant who refuses to enter or requests to leave the courtroom, 3) the addition of a provision for remote hearing or viewing of courtroom proceedings by a defendant who is absent under the rule, and 4) the elimination of references to gender.

This rule does not address unusual security measures a judge may in the exercise of discretion determine are necessary. See *Commonwealth v. Brown*, 364 Mass. 471, 478-480 and nn. 18-20 (1973) (listing factors a judge might consider in assessing whether unusual security precautions are necessary); *Commonwealth v. Martin*, 424 Mass. 301, 307-310 (1997) (reiterating *Brown*'s recommendations that such measures should be initially agreed to by custodial authorities and the parties, and that absent such agreement the judge should have a hearing with the defendant and counsel on the record to set forth reasoning for such measures); and *Commonwealth v. Rocheleau*, 90 Mass. App. Ct. 634, 637 (2016) (trial judge's observations that defendant was "large" and in custody and that the ground floor courtroom had a publicly accessible back door were not particularized findings that "the defendant threatened violence, behaved in a threatening or disruptive manner, or otherwise posed an evident risk of flight" which could support any unusual security measures, though error was harmless). When necessary, unusual security measures "should be accomplished in the least obtrusive and disruptive manner, with an effort made to minimize any adverse impact." Standard 6-3.2 of the American Bar Association's Criminal Justice Standards – Special Functions of the Trial Judge, 3<sup>rd</sup> Ed., 2000 ("Security in court facilities").

A criminal defendant has a fundamental right to be present at trial guaranteed by both the Federal and state constitutions. See *Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."); *Commonwealth v. Bergstrom*, 402 Mass. 534, 543 (1988) ("[I]t is a mainstay of constitutional jurisprudence in the Commonwealth that a defendant has a corollary right to be present personally throughout his trial."). The defendant also has a right as a matter of due process to be present at all critical stages of the proceedings. *United States v.*

*Gagnon*, 470 U.S. 522, 526 (1985) (citing *Snyder v. Massachusetts*, 291 U.S. 97 (1934)). See also Mass. R. Crim. P. 18 (Presence of Defendant).

The defendant's right to be physically present at trial, however, can be forfeited by misconduct or waived by consent. *Illinois v. Allen*, *id.* If the misconduct involves disruption or threatened disruption in the courtroom, the defendant can be removed from the courtroom. Mass. R. Crim. P. 45(a). If a defendant in custody refuses to enter the courtroom or requests to leave the courtroom, the defendant can thereby waive the right to be physically present and the trial may proceed in the defendant's absence. Mass. R. Crim. P. 45(b). In either case, the decision is committed to the sound discretion of the trial judge. *Commonwealth v. Scionti*, 81 Mass. App. Ct. 266, 277 (2012). However, a judge should make particularized findings before allowing the trial to proceed in the defendant's absence. *Rocheleau*, 90 Mass. App. Ct. at 637.

### Removal of Defendant

The first sentence of this rule comes verbatim from Standard 6-3.8 of the American Bar Association's Criminal Justice Standards – Special Functions of the Trial Judge, 3<sup>rd</sup> Ed., 2000 ("The disruptive defendant"). While the Standard (first published in 1971-72) then states that removal is "preferable to gagging or shackling the disruptive defendant," the overwhelming majority of jurisdictions whose rules address remedies a judge may take to control a disruptive defendant now mention only removal. See Fed. R. Crim. P. 43(c)(1)(C); Alaska R. Crim. P. 38(c); Ariz. R. Crim. P. 9.2; Cal. Pen. Code § 1043(b); Colo. R. Crim. P. 43(b); Del. Super. Ct. R. Crim. P. 43(b)(2); Fla. R. Crim. P. 3.180; Haw. R. Pen. P. 43(b); La. Code Crim. P. art. 832; Md. R. Crim. 4-231(c)(2); Miss. R. Crim. P. 10.2; N.M. R. Crim. P. Dist. Ct. 5-612C(2); N.Y. C.P.L. § 340.50; N.C. Gen. Stat. § 15A-1032; N.D. R. Crim. P. 43(c)(3); Ohio R. Crim. P. 43(B); R.I. Super. Ct. R. Crim. P. 43; S.C. R. Crim. P. 133(c); S.D. Cod. Laws Title 23A – Crim. P. Rule 43(b)(2); Tenn. R. Crim. P. 43(b)(2); Utah R. Crim. P. 17(a)(3); Wash. R. Crim. P. 3.4(b); W.Va. R. Crim. P. 43(b)(2); and Wyo. R. Crim. P. 43(b)(2). One jurisdiction's rules of criminal procedure expressly bar "gagging." Vt. R. Crim. P. 43(b)(2). Only four jurisdictions expressly permit gagging (Ala. R. Crim. P. 9.2.; Idaho R. Crim. P. 43(c); Iowa Crim. R. 2.27(4); Nev. Rev. Stat. § 175.387), while two permit restraints. See Ark. R. Crim. P. 33.4; and Minn. Rule Crim. P. 26.03, Subd. 1(2). This amendment eliminates the language that "Removal is preferable to gagging or shackling the disruptive defendant," because of the extraordinary danger presented by restricting the airway of an uncooperative or highly agitated person, because of the experience of so many other jurisdictions, and because removal and remote observation is a much safer and now more readily available alternative.

Before a judge removes a defendant because of disruptive behavior, the defendant must be warned that removal may occur if the disruptive behavior continues. *Commonwealth v. Chubbuck*, 384 Mass. 746, 751 (1981) (defendant must be "appropriately warned and continu[e] his disruptive behavior despite such warning"). See also *Commonwealth v. Senati*, 3 Mass. App. Ct. 304, 307-308 (1975) (no abuse of discretion when trial judge removed defendant from courtroom after defendant's outbursts before jury and his repeated refusal to answer judge whether he would remain silent during closing arguments). A judge who removes a defendant from the courtroom must advise the defendant that the defendant may return upon providing assurances of proper behavior. *Commonwealth v. North*, 52 Mass. App. Ct. 603, 618 (2001) (judge's handling of defendant's removal was "exemplary" where court "firmly established that such tactics [of inappropriate outbursts] would not be countenanced, but promptly allowed the

defendant the opportunity to return upon a promise of good behavior"). Upon the defendant's request, the jury must be instructed not to consider the defendant's removal.

#### Absence of Defendant

A defendant in custody may choose to be absent from the trial by refusing to enter the courtroom or by requesting to leave the courtroom and can thereby waive the right to be physically present at trial. While the judge has discretion to proceed with the trial in the defendant's absence, because the right to be physically present at one's trial is fundamental, its waiver must be knowing and voluntary. *Commonwealth v. L'Abbe*, 421 Mass. 262, 268-269 (1995) (defendant's daily colloquy with judge and signing a statement each day regarding waiver of his presence was an adequate waiver even at a capital trial). A defendant who is simply absent without explanation has not thereby waived the right to be physically present at trial. *Commonwealth v. Nwachukwu*, 65 Mass. App. Ct. 112, 118 (2005) (defendant who left courtroom at instruction of inexperienced trial counsel after judge ordered sequestration of witnesses did not thereby waive right of physical presence at trial.). A defendant must be competent to waive the right to be physically present at trial, which requires the same level of competency as that required to stand trial. *L'Abbe*, 421 Mass. at 268-269.

If the defendant's prior actions provide a substantial basis for the judge to believe that the defendant's behavior will be so disruptive that the trial cannot proceed in an orderly manner, the judge may request an assurance of good behavior. If the defendant refuses to provide such assurances, the judge has the discretion to proceed with the trial in the defendant's absence. In this instance, the judge need not bring the defendant into the courtroom for a warning that the trial will nevertheless proceed because this would create the very risk the judge seeks to avoid. *Scionti*, 81 Mass. App. Ct. at 277 (trial judge's proceeding with trial without first bringing defendant in for a warning that trial would continue in his absence was not an abuse of discretion when defendant repeatedly refused to be brought in, judge gave defendant multiple opportunities to be brought into the courtroom, and judge arranged for a communications system for defendant to remotely hear courtroom proceedings). As with removal of a disruptive defendant, the court should make particularized findings setting forth the defendant's prior actions that provide the substantial basis to believe that the defendant's behavior will be so disruptive that the trial cannot proceed in an orderly manner.

#### Rights of Defendant

Whenever the defendant is absent upon the defendant's request, the judge must advise the defendant that the defendant may be admitted upon request. Whenever the defendant is absent by removal or because of prior actions, the judge must advise the defendant that the defendant may be admitted upon providing assurances of good behavior. Whenever possible, the absent defendant should nevertheless be provided means to hear or observe proceedings in the courtroom. See *Scionti*, 81 Mass. App. Ct. at 281 (noting judge's arrangement for audio link between court room and defendant's cell, and for presence of second attorney outside defendant's cell to facilitate communication between defendant and trial counsel).