SUPREME JUDICIAL COURT

Boston, Massachusetts 02108

NOTICE OF APPROVAL

Notice is hereby given that the Supreme Judicial Court has approved and promulgated rules as further indicated below.

RALPH D. GANTS
Chief Justice

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1. Court submitting Rules for Approval:

   Chief Justice of the Trial Court

2. Date Rules Submitted for Approval:

   July 19, 2016

3. Date Approved & Promulgated by the Supreme Judicial Court:

   July 20, 2016

4. Rule or Rules, or Amendments Thereto, Approved and Promulgated:

   Amendments to the Uniform Trial Court Rules for Civil Commitment Proceedings for Alcohol and Substance Abuse Disorders, as attached.

5. Effective Date:

   September 6, 2016

(The original of this notice is to be filed in the office of the Clerk of the Supreme Judicial Court for the Commonwealth, and a copy to be sent by the Clerk to the court which requested approval of the rules.)

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF THE TRIAL COURT
John Adams Courthouse
One Pemberton Square, Floor 1M
Boston, Massachusetts 02108
617-878-0203

Paula Carey
Chief Justice of the Trial Court

July 19, 2016

The Hon. Robert J. Cordy
Justice of the Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

The Hon. Margot Botsford
Justice of the Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

The Hon. Fernande R.V. Duffly
Justice of the Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Re: Proposed Amendments to the Uniform Trial Court Rules for Civil Commitment Proceedings for Alcohol and Substance Use Disorders

Dear Justices Cordy, Botsford, and Duffly:

Attached please find, for your approval, proposed amendments to what would be renamed the Uniform Trial Court Rules for Civil Commitment Proceedings for Alcohol and Substance Use Disorders. On July 22, 2015, the Supreme Judicial Court approved Uniform Trial Court Rules for Civil Commitment Proceedings for Alcohol and Substance Abuse. These rules were effective February 1, 2016, but have already proved to be a vital resource for petitioners, respondents, attorneys, and court personnel in understanding the process involved in commitment proceedings under G.L. c. 123, § 35, as well as a much-needed source of uniformity and regularity.

Since your approval of the Uniform Trial Court Rules, the Legislature has twice amended G.L. c. 123, § 35. *See* An Act Relative to Civil Commitments for Alcohol and Substance Use Disorders, St. 2016, c. 8; An Act Relative to Substance Use, Treatment, Education, and Prevention, St. 2016, c. 52, § 40. Accordingly, in March 2016, I published proposed amendments to the Uniform Trial Court Rules to conform the Rules to these new legislative developments.

I received no formal comments regarding the proposed amendments. My staff received well-considered informal comments from the Executive Branch and from a Trial Court justice, all of which have been incorporated into the proposed amendments.

I have included a proposed final version of the amendments to the Uniform Rules as well as a redline version showing the changes.

The proposed changes all reflect statutory changes that have already become effective and thus reflect changes in practice that have already occurred. For this reason, I recommend that the amendments, if approved, be effective immediately.

I greatly appreciate your kind attention to these proposed amendments.

Sincerely,

Paula M. Carey
Chief Justice of the Trial Court

Enclosure(s)

TRIAL COURT RULE XIII

UNIFORM TRIAL COURT RULES
for
CIVIL COMMITMENT PROCEEDINGS
for
ALCOHOL AND SUBSTANCE USE DISORDERS
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 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 individual with an alcohol or substance use disorder, as those terms are defined in G.L. c. 123, § 35. Such a petitioner, including a court official, may petition on behalf of the respondent.

(b) Proceedings may be commenced in any Division of any of the three Departments without regard to the age, residence, or location of the respondent, but the age, residence, or location of the respondent may determine to which Division or 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.

Commentary—2015

These rules implement the provisions of G.L. c. 123, § 35, clarifying and facilitating the conduct of the proceedings that the statute requires. Although section 35 appears within chapter 123, *Mental Health*, its provisions are confined to commitment for alcohol and substance use. The purpose of these rules is to provide a procedural groundwork for the orderly processing of section 35 petitions.

Rule 1(a) regulates the existing practice in the courts of allowing persons to seek their own commitment for substance use treatment. The statute requires that a police officer, physician, spouse, blood relative, guardian, or court official act as petitioner. As a result, a substance user desiring his own commitment will need to obtain the assistance of a statutorily-authorized petitioner. In many courts, a police prosecutor or a probation officer or other court official will be available to serve as petitioner when a substance user seeks the assistance of the court in addressing the addiction. Such a police officer or court official would be expected to determine whether there is a reasonable basis to believe that the substance user meets the statutory requirements for commitment and that voluntary treatment resources are unavailable or inadequate for the substance user's needs. The rule specifically permits this useful procedure.

Section 35 permits a qualified petitioner to initiate a petition in "any district court or any division of the juvenile court department." Unlike with harassment prevention orders, *see* G.L. c. 258E, § 2, section 35 imposes no venue requirements and does not differentiate jurisdiction by the age of the respondent. Accordingly, Rule 1(b) recognizes that there is no basis for denying a petitioner the right to file a petition in the Division or Department of the petitioner's choice. *Cf. M.B. v. J.B.*, 86 Mass. App. Ct. 108, 114-15 (2014) (venue requirements in G.L. c. 209A, § 2 are not jurisdictional and must be raised by the respondent or are waived). A petition for the commitment of a juvenile may be filed in Boston Municipal Court or a District Court, and a petition for the commitment of an adult may be filed in Juvenile Court. Similarly, a petition for commitment may be filed in a Division that is not the usual residence of the respondent. There is no statutory basis for prohibiting a petitioner from a choice of Department and Division and, in light of the usual emergency nature of section 35 petitions, requiring a petitioner to travel to another court could impose unnecessary risks to the safety of the respondent and others. Nonetheless, as provided in Rule 3(d), where the respondent is not present, the court may direct that the case ultimately be adjudicated in a more appropriate location or Department while respecting the petitioner's choice of where to initiate the petition.

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, once the petitioner has filed the petition by signing it and providing it to the court, 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.

Commentary—2016 Amendments

General Laws c. 123, § 35 was amended in 2016 by An Act Relative to Civil Commitments for Alcohol and Substance Use Disorders, St. 2016, c. 8, requiring revisions to the Uniform Rules. The Act was effective April 24, 2016.

Among other things, the 2016 legislation deleted the outdated terms "alcoholic" and "substance abuser," and replaced them with "alcohol use disorder" and "substance use disorder." St. 2016, c. 8, §§ 1-2, 4. This exemplary change reflects the desirability of removing stigma from persons suffering from these disorders, with the beneficial effects of increasing the willingness of persons to seek treatment for these disorders, both for themselves or for others. All participants in G.L. c. 123, § 35 commitment proceedings should remain focused on the goals of protecting persons suffering from these disorders and the community from the likelihood of serious harm and of providing necessary treatment to such persons.

The 2016 legislation reformatted G.L. c. 123, § 35, most notably by collapsing the first and second paragraphs into one paragraph and by replacing the fourth and fifth paragraphs with three paragraphs (now the third, fourth, and fifth paragraphs).

Accordingly, some of the citations in the original commentary are now citing to an incorrect paragraph.

Rule 2. 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 expeditiously before a judge who shall review the petition on the record in court. 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 individual with an alcohol or substance use disorder 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.

Commentary—2015

Rule 2 contemplates that the judge may be able to determine that a petition lacks merit prior to the issuance of a summons or a warrant. The judge, in the exercise of discretion, may inquire further of a petitioner in making this preliminary decision. If the petitioner is statutorily unqualified but appears to have a strong case for the respondent's commitment, the judge may choose to refer the petitioner to a qualified petitioner, who would then decide whether to file a new petition for commitment. The absence of the petitioner, because the petitioner is a physician still at a hospital or for any other reason, would not be by itself grounds for dismissing the petition.

The last two sentences of Rule 2 recognize the importance of prompt action when addressing section 35 petitions. When the respondent is present at the time of the petition, the court must proceed expeditiously to the appointment of counsel and no consideration is given to whether a different Division or Department would have been preferable. When the respondent is not present, the court must expeditiously decide whether to issue a summons or a warrant.

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 issue a warrant 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) The judge shall determine how long the warrant shall be effective, but shall not make any warrant effective for more than five business days. A warrant issued under this rule 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 judge determines that the case should be heard in another Division or Department, because of the respondent's age or location or for other good reason, the judge may, in the exercise of discretion, make the warrant or summons returnable to an appropriate court in another Division or Department. The clerk shall notify the return court of the warrant or summons and transmit the papers listed in Rule 10(a) to the return court.

Commentary—2015

The standard for a warrant in Rule 3(a) is taken directly from G.L. c. 123, § 35, ¶ 3. It is important to note that immediate danger to the physical well-being of the respondent is a statutory prerequisite for issuing a warrant of apprehension at the time of 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.

Rule 3(c) provides that the judge must determine how long a warrant of apprehension may be effective, but must choose a length of time no longer than three business days. Because of the emergency nature of section 35 petitions, the information supporting the petition is likely to become stale with the passage of time. The judge should make the warrant effective for a period of time less than three business days if the nature of the petition suggests that the information will become stale sooner than that. If the warrant expires without the respondent's apprehension, the petitioner would be able to initiate a new petition after providing fresh information or confirming the continued need for apprehension.

The provisions of Rule 3(d) 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, a judge may decide that the filing court is a poor venue to adjudicate the petition because the respondent is expected to be located far from the court or because witnesses and information might be available in a different venue, such as one that contains the respondent's school or place of employment. In such cases, the judge may choose to make the warrant or summons returnable to the preferred venue.

Commentary—2016 Amendments

General Laws c. 123, § 35 was amended in 2016 by An Act Relative to Substance Use, Treatment, Education, and Prevention, St. 2016, c. 52, § 40. This amendment provides that "the warrant shall continue day after day for up to 5 consecutive days, excluding Saturdays, Sundays and legal holidays, or until such time as the person is presented to the court, whichever is sooner; provided, however that an arrest on such warrant shall not be made unless the person may be presented immediately before a judge." The act was effective March 14, 2016.

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.

Commentary—2015

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, or even before then, 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, ¶ 3, and the attorney should be allowed to consult with the respondent before the examination begins.

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.

Commentary—2015

Section 35 provides that "[t]he court shall order examination by a qualified physician, qualified psychologist or a social worker." Rule 5 clarifies that the social worker must be qualified to opine on substance abuse matters. *See* 104 C.M.R. § 33.06 (setting forth the process for designating social workers to opine on section 35 matters); *accord* 104 C.M.R. § 33.04 (process for designating physicians and psychologists).

As there is no statutory provision for holding a respondent overnight pending a hearing, the examination (and the hearing) must occur as soon as practical and, in any

event, no later than the end of the day on which the respondent is brought to court. Prior to the examination, a psychologist or social worker clinician must provide the respondent with the warnings required by *Commonwealth v. Lamb*, 365 Mass. 265, 270 (1974), regarding the unprivileged nature of communications during the examination, and the respondent must knowingly and voluntarily waive the privilege otherwise afforded by G.L. c. 233, § 20B or G.L. c. 112, § 135B. *See In re Laura L.*, 54 Mass. App. Ct. 853, 858-61 (2002). In deciding whether to waive the privilege and participate in the examination, the respondent may consult with counsel. *See Seng v. Commonwealth*, 445 Mass. 536, 548-49 (2005). As provided in Rule 7(b), if the respondent declines to participate in the examination, the clinician may nevertheless render an opinion and, in testifying at the commitment hearing, may report the respondent's refusal to participate. The judge, however, may not draw an adverse inference from the respondent's refusal to participate in the examination.

Commentary—2016 Amendments

The 2016 legislation amended G.L. c. 123, § 35 to add the word "qualified" before "social worker" in the list of persons who may conduct an examination. St. 2016, c. 8, § 3. The original Rule 5 already had this requirement.

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 expeditiously to determine whether there is clear and convincing evidence that (1) the respondent is an individual with an alcoholic or a substance use disorder, 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 alcohol or substance use disorder, to the respondent, the petitioner, or any other person.

(b) The judge may inquire of the petitioner and may accept testimony or other evidence from the petitioner or any other person, including a court official.

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

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

Commentary—2015

Among the provisions in these 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 re Jennifer Henley,* Supreme Judicial Court Single Justice Opinion (July 23, 2014) (section 35 hearings involve "several important unresolved issues" regarding evidentiary standards). These issues are addressed in Rules 6 and 7.

Rule 6(a) 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). The Supreme Judicial Court has explained that the reason that proof beyond a reasonable doubt is required in the G.L. c. 123A and G.L. c. 123, § 8 contexts is because "civil commitment of those who are mentally ill and dangerous to themselves or others is 'potentially indefinite and even lifelong,' although the first order of commitment expires after six months and all subsequent commitments expire after one year." *Abbott A. v. Commonwealth*, 458 Mass. 24, 40 (2010) (quoting *Mendonza*, 423 Mass. at 783) (citation omitted); *accord Querubin v. Commonwealth*, 440 Mass. 108, 120 n.9 (2003). Shorter-term civil commitments under G.L. c. 123, § 12 and § 15, by contrast, do not require proof beyond a reasonable doubt. *Mendonza*, 423 Mass. at 783 n.5. A commitment order under section 35 cannot be extended beyond 90 days for any reason. *Contrast Abbott A.*, 458 Mass. at 36-40 (pretrial detention for dangerousness under G.L. c. 276, § 58A may be extended under certain, limited circumstances). Accordingly, proof beyond a reasonable doubt is not required to satisfy the requirements of due process in section 35 proceedings.

Rule 6(b) recognizes that, after the amendment of section 35 in St. 2011, c. 142, § 18, nonmedical testimony may be presented to the court in support of a section 35 petition, in addition to the medical testimony of the clinician. Accordingly, the judge may inquire of the petitioner (or the nonqualified petitioner who brought the matter to the attention of a court official) to determine whether the petitioner has relevant evidence to present on the petition. Similarly, the judge may accept testimony or evidence from other witnesses as well. Where court officials, especially probation officers, have had contact with a respondent, they may well have useful information for the court.

Section 35 provides that the respondent "may present independent expert or other testimony." Rule 6(c) expands this right to include cross-examination and the submission of nontestimonial evidence.

Commentary—2016 Amendments

As discussed in the commentary to Rule 1, the 2016 legislation deleted the terms "alcoholic" and "substance abuser" and replaced them with "alcohol use disorder" and "substance use disorder." St. 2016, c. 8, §§ 1-2, 4.

In addition, after the promulgation of the original Uniform Rules, the Supreme Judicial Court approved the standard of proof in Rule 6(a) in *In re G.P.*, 473 Mass. 112, 118-20 (2015). The Court also provided detailed guidance on assessing the likelihood of serious harm when adjudicating section 35 commitments proceedings. *G.P.*, 473 Mass. at 124-29.

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 from offering an opinion despite such refusal and reporting such refusal to the court.

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

Commentary—2015

Rule 7(a) permits the admission of hearsay in section 35 proceedings. The Supreme Judicial Court has consistently permitted the admission of hearsay in appropriate proceedings "even where deprivation of liberty is at stake as is the case here." *Mendonza v. Commonwealth*, 423 Mass. 771, 785 (1996) (dangerousness hearing under G.L. c. 276, § 58A); *accord Commonwealth v. Bukin*, 467 Mass. 516, 519-20 (2014) (hearsay is admissible in probation violation proceedings); *Querubin v. Commonwealth*, 440 Mass. 108, 118 (2003) (decision whether to admit a defendant to bail). Pretrial commitment on the basis of dangerousness or unlikelihood to appear at trial 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(a) 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 only upon 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, 34-36 (2010), and revocation of probation, *Bukin*, 467 Mass. at 522.

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. *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). Rule 7(b), therefore, bars drawing such an inference. These rules, however, are not intended to interfere with a qualified clinician's exercise of the clinician's medical judgment. Accordingly, the clinician may offer an opinion despite a respondent's refusal to speak and may report that refusal to the court, so as to provide the judge with an understanding of the basis of the clinician's opinion. 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 7(c) recognizes that, since St. 2011, c. 142, § 18 amended G.L. c. 123, § 35, ¶ 4, a judge must hear medical testimony but may base a decision on other testimony and evidence. In light of the legislative provisions for examination by a psychologist, St. 1989, c. 352, or by a social worker, St. 2014, c. 165, § 155, the meaning of "medical testimony" extends beyond expert testimony by a medical doctor. *Cf. Ortiz v. Examworks, Inc.*, 470 Mass. 784, 788 (2015) (usual and accepted meaning of "physician" extends beyond medical doctors to all "who engage in the healing arts"). It may include the opinion of a qualified psychologist or social worker, or even lay testimony about medical matters by persons with personal knowledge of such matters. *See Commonwealth v. Gaudette*, 441 Mass. 762, 771 (2004) (lay person may testify about the extent of a family member's injuries and length of recovery); *Moore v. Fleet Refrigeration & Air Conditioning Co.*, 28 Mass. App. Ct. 971, 972 (1990) (error to categorically exclude a social worker's testimony on psychological matters on the ground that she was not a medical doctor).

Commentary—2016 Amendments

After the promulgation of the original Uniform Rules, the Supreme Judicial Court approved the inapplicability of the rules of evidence in Rule 7(a) in *In re G.P.*, 473 Mass. 112, 120-22 (2015).

Rule 8. Findings 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, which shall be for a period not to exceed 90 days. The order shall specify whether the commitment is based on a finding of alcohol use disorder, substance use disorder, or both. The commitment shall be to a facility designated by the department of public health. The order shall specify 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.

(b) The judge shall include a provision in the order requiring the facility, or any facility to which the respondent is transferred, to 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 by the respondent.

(c) The commitment shall be made to a facility approved by the department of public health for the care and treatment of individuals with an alcohol or substance use disorder. If (i) the judge finds that the only appropriate setting for the treatment of the respondent is a secure facility or (ii) the department of public health informs the court that there are no suitable facilities available for treatment licensed or approved by the department of public health or the department of mental health, the judge may commit the respondent to the Massachusetts correctional institution at Bridgewater, for an adult

male respondent, or to a secure facility for women approved by the department of public health or the department of mental health, for an adult female respondent.

(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.

Commentary—2015

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 statue 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, ¶ 4.

Rule 8(b) requires the judge to include a provision in a commitment order requiring the receiving facility to provide notice to the court of the release of the respondent. Such notice may be useful to the court in addressing future issues concerning the respondent or petitioner. In the case of any escape, such notification

permits the court to determine whether further action is advisable, such as the issuance of a warrant for apprehension.

Rule 8(c) requires that commitment to the Department of Correction be limited to situations in which there is no facility approved by the Department of Public Health that is suitable and available. As Rule 8(c) reflects, commitment of a juvenile to the Department of Correction is never appropriate and may violate the Prison Rape Elimination Act. *See* 28 C.F.R. § 115.14(a).

Particular care is necessary when a respondent is subject to other criminal process, such as an unsatisfied order of bail. Commitment under section 35 may be advisable for criminal defendants, especially where the respondent might otherwise be able to post bail before completing treatment in pretrial detention. In such circumstances, it is necessary that the respondent be returned to court upon release from the facility so that the court may ensure that the criminal process is respected and revisit the criminal process if necessary. When a criminal defendant is committed under section 35, the judge should make a bail determination at the time of arraignment and not defer the bail determination until after release from the section 35 commitment. Any changes to the bail order after successful completion of treatment can be addressed as a matter of course after treatment without visiting upon the respondent and the Commonwealth the uncertainty of unaddressed bail.

Rule 8(d) addresses the firearm warning required by St. 2014, c. 284, § 15.

Commentary—2016 Amendments

The 2016 legislation made several changes to the options available to committing courts and to how respondents are handled after commitment, all necessitating changes to the Uniform Rules.

The amendments to Rule 8(a) and 8(b) recognize that the 2016 legislation granted the superintendents of treatment facilities plenary authority to transfer respondents between and among approved facilities. St. 2016, c. 8, § 4. Accordingly, Rule 8(a) now extends the requirement for maintaining custody of the respondent to the superintendent of any facility to which the respondent is transferred. The means by which custody is provided, maintained, and described is exclusively within the discretion of the appropriate Executive Branch authority. It remains the case that no facility may release the respondent prior to ninety days absent a written determination that release of the respondent will not result in a likelihood of serious harm.

Rule 8(b) has been amended so that the commitment order shall include a provision that facilities notify the court of any transfers, as required by the amended G.L. c. 123, § 35. The rule continues the requirement that facilities notify the committing court of any release or escape, specifically providing that this duty falls upon the facility receiving a transferred respondent. The rule now clarifies that the notice must be made to

the clerk of the committing court, and in the manner directed by the court in the commitment order.

The amendments to Rule 8(c) implement the 2016 legislation's prohibition on committing female respondents to the Department of Correction. St. 2016, c. 8, § 4. The amended Rule 8(c) recognizes that adult females may be committed to a secure facility for women approved by the department of public health or the department of mental health. The amended Rule 8(c) also reflects the new statutory standard for commitment to the new secure facilities or, for adult men, to the Department of Correction. Finally, in light of the new transferability of section 35 respondents, it is no longer necessary that the commitment order specify a facility, although it may be convenient for the judge to specify to which facility a respondent will initially be sent.

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.

Commentary—2015

Rule 9 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 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. Proceedings when a respondent appears before a court other than the court that issued the warrant or summons

(a) When (1) a warrant or summons is issued pursuant to Rule 3(d) or (2) a warrant is executed where it is impractical to transport the respondent to the return court, the respondent may be brought before a 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 new 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.

Commentary—2015

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 another 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. 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.

(c) The clerk shall serve notice of the filing of the appeal to any adverse party and to the facility to which a respondent was committed, if any.

Commentary—2015

Rule 11 provides a direct appellate remedy for section 35 determinations to the appropriate Appellate Division or, in the case of the Juvenile Court, to the Appeals Court. *See Hunt v. Appeals Ct.*, 444 Mass. 460, 463-66 (2005) (where a statute does not expressly provide an appellate remedy, rules may provide an appropriate avenue of appeal). 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 becoming moot.

Although the appellee ordinarily will be the petitioner (in the case of an appeal by the respondent) or the respondent (in the case of an appeal by the petitioner), Rule 11(c) requires the clerk to notify the facility to which the respondent was committed. Knowledge of the appeal may require alterations to the respondent's treatment, and the facility may seek to be heard by the appellate court, either in support of or in opposition to continued commitment, in certain cases.

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.

Commentary—2016 Amendments

After the promulgation of the original Uniform Rules, the Supreme Judicial Court approved the appellate review procedures in Rule 11. *In re G.P.*, 473 Mass. 112, 123-24 (2015).