CHAPTER 6

Litigating Mental Health Cases

Scope Note

This chapter addresses the scope and duties of counsel who represent clients in cases involving involuntary civil commitment, guardianships, and substituted judgment. Access to clients and their records, and evidence, including hearsay, expert opinion, and privilege are a few of the topics addressed.

§ 6.1 THE RIGHT TO COUNSEL AND ASSIGNMENT OF COUNSEL

Any individual against whom a petition for involuntary commitment to a mental health facility, or a petition seeking authority to treat under G.L. c. 123, § 8B, is filed is entitled to the assistance of counsel. G.L. c. 123, § 5. Anyone who is subject to such petition is presumed to be indigent and counsel must be assigned to represent them. SJC Rule 3:10, § 1(h)(iii). Counsel is assigned from either a panel of attorneys certified by the Mental Health Litigation Division of the Committee for Public Counsel Services or from one of the Mental Health Litigation Division's trial offices.

Under G.L. c. 190B, whenever a petition is filed seeking a protective order, the appointment of a guardian or conservator, or for the termination or modification of any such appointment or order, the Probate and Family Court must appoint counsel, if requested by the subject of the petition or by someone on behalf of the person, or if the court "determines at any time in the proceeding that the interests of the person are or may be inadequately represented." G.L. c. 190B, § 5-106(a). As with civil commitments, there is a presumption that the person is indigent and entitled to the appointment of counsel at the Commonwealth's expense. A person against whom a petition is filed in the Probate and Family Court seeking the authority to administer extraordinary treatment, or the authority to admit to a nursing facility for no longer than sixty days, is entitled to the assistance of appointed counsel. G.L. c. 190B, §§ 5-306A, 5-309(g); SJC Rule 3:10, § 1(h)(iii). Unless the person is represented,

> the judge shall assign the Committee for Public Counsel Services to provide representation for the party, unless exceptional circumstances, supported by written findings, necessitate a different procedure that is consistent with G.L. c. 211D and the rules of the Supreme Judicial Court. The clerk or register shall promptly notify the party of the assignment of counsel.

SJC Rule 3:10, § 6. However, when the judge has reason to believe that the party is not indigent, a determination of indigency shall be made in accordance with Section 5 and other applicable provisions of this rule. SJC Rule 3:10, § 1(h)(iii)(1).

If the court determines

> that the party is not indigent, assigned counsel may be dismissed, and the party shall be advised to retain private counsel without delay; provided, however, that the judge shall authorize the continued services of appointed counsel at public expense where the interests of justice so require. The interests of justice may require such appointment if, for example, the party is incompetent to obtain counsel, unable to access funds, or unable to retain counsel. If, after the hearing has commenced, the judge determines that the party is not indigent, appointed counsel shall continue to represent the party and the judge may order the party to reimburse the Commonwealth for the cost of counsel.

SJC Rule 3:10, § 6.

If the person refuses legal representation, the court must determine whether the waiver is competent. SJC Rule 3:10, § 3. If the person is not competent to waive counsel, or justice otherwise requires, the court may assign standby counsel. SJC Rule 3:10, § 4. If the person objects to a particular attorney despite that attorney's best efforts to establish an effective professional relationship, the attorney should move to withdraw and ask that successor counsel be assigned. (Counsel must be careful to avoid divulging confidential or other information that could be harmful to the client's interests.) The court should determine whether the person's objections are reasonable. If so, the motions should be allowed and successor counsel appointed. If not, the motion to withdraw should be denied and the attorney should continue as counsel or be directed to serve as standby counsel. SJC Rule 3:10, §§ 3, 4, 6.

If the client is advised to retain private counsel, the attorney who had been previously assigned may be retained, provided that counsel fully explains to the client that such representation may create the appearance of impropriety, solicitation, or overreaching. If the client nevertheless wishes to retain the attorney, the attorney must obtain a written statement signed by the client stating the client's understanding of the right to retain counsel. *CPCS Assigned Counsel Manual*, ch. 5, § C(1) (2019).

§ 6.2 THE ROLE OF ASSIGNED COUNSEL

CPCS has performance standards that set out specific tasks to be performed by assigned counsel in civil commitment, guardianship, and substituted judgment proceedings, and mental health appeals. See **Appendix K**, Performance Standard on Representation of Clients by Mental Health Appellate Counsel; **Appendix L**, Performance Standard on Representation of Indigent Adults in Guardianship and Authorization to Treat Proceedings; and **Appendix M**, Performance Standard on Representation of Clients in Civil Commitment Cases. See also **Appendix I**, CPCS Trial Practice Checklist for Civil Commitments; and **Appendix J**, CPCS Trial Practice Checklist for Guardianships with Authority to Admit and Administer Extraordinary Treatment. Attorneys accepting mental health assignments through CPCS and the Probate and Family Court

must comply with these performance standards, the Massachusetts Rules of Professional Conduct, and all applicable CPCS policies and procedures published online in the *Assigned Counsel Manual*.

§ 6.2.1 Commitment

The role of the attorney in a commitment case is to zealously advocate for the respondent in opposition to the petition, and to ensure that the respondent is afforded all due process, equal protection, and other rights under the U.S. Constitution, the Massachusetts Declaration of Rights, federal and state law, including the Americans with Disabilities Act, and regulations. Counsel must ensure that the petitioning facility is made to meet its burden of proving, beyond a reasonable doubt, that the respondent meets the criteria for commitment.

§ 6.2.2 Guardianship

The role of counsel in guardianship proceedings is to diligently and zealously advocate on behalf of their client, to ensure that the client is afforded all due process, equal protection, and other rights under the U.S. Constitution, the Massachusetts Declaration of Rights, state and federal law, and regulations. Only in exceptional circumstances, such as when a client is in a coma or completely unable to function independently, may counsel considering stipulating to the client's incapacity. If the attorney stipulates to incapacity, it should only be for the purpose of a temporary guardianship, and counsel should remain in the case and monitor the respondent's condition to assure that the guardianship can be vacated when the client regains capacity.

Counsel is

> "charged with the responsibility of zealously representing the ward and must have full opportunity to meet with the ward, present proof, and cross-examine witnesses at the hearing. *In the Matter of Grady*, supra at 264, 426 N.E.2d 467. In order to guarantee a thorough adversary exploration of the difficult question posed, the guardian ad litem should present all reasonable arguments in favor of the court's denial of the petition, so that "all viewpoints and alternatives will be aggressively pursued and examined at the subsequent hearing." *Saikewicz*, supra at 757, 370 N.E.2d 417. This adversary posture will ensure that both sides of each issue which the court must consider are thoroughly aired before findings are made and a decision rendered. *Accord C. D. M. v. State*, supra at 612; *In the Matter of A. W.*, supra at 375; *In the Matter of Grady*, supra at 264, 426 N.E.2d 467; *Guardianship of Hayes*, supra at 236-238, 608 P.2d 635.

Matter of Moe, 385 Mass. 555, 567 (1982); *see also In re Guardianship of Zaltman*, 65 Mass. App. Ct. 678, n.17 (2006).

Under G.L. c. 190B, upon a finding of incapacity, the Probate and Family Court is required to "[e]xercise [its] authority . . . so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's limitations or other conditions warranting the procedure." G.L. c. 190B, § 5-306(a). Full or plenary guardianship is the exception rather than the rule. To that end, counsel must ensure that, in those cases in which the court finds the client is incapacitated, the guardian's authority is strictly tailored to the specific decision-making needs of the client and that the Probate and Family Court issues an order stating these limitations, as well as the rights retained by the client. CPCS Performance Standard § 4.H, ¶ 13.

§ 6.2.3 Practice Advisory

A frequent concern in mental health proceedings is counsel's responsibility when a client does not want to contest the petition and wants to remain in the facility, or when the client against whom is filed a petition seeking the authority to treat wishes to undergo the proposed treatment. In either circumstance, counsel's obligation will be to oppose the petition by arguing that the person is competent and able to make informed decisions without court intervention.

In commitment cases, counsel's obligation is to oppose the petition and argue for less restrictive alternatives to commitment. If the client understands the legal, clinical, and personal consequences of remaining at the facility, counsel should enter into negotiations with petitioner's counsel to secure a conditional voluntary admission, eliminating the need for an order of commitment and avoiding the stigma and collateral consequences of commitment. *See In the Matter of F.C.*, 479 Mass. 1029 (2018) (stigma attendant to involuntary civil commitment sufficient to overcome presumption of mootness); G.L. c. 123, § 36C (involuntary commitment under Chapter 123 results in loss of Second Amendment rights). If the hospital will not accept an application for conditional voluntary status, counsel may want to consider entering into a stipulation where the client asserts that if they proceeded to hearing, the petitioner could present evidence to meet the criteria for commitment. Stipulations may include an agreement that the client will participate in treatment, usually the acceptance of antipsychotic medications. Stipulations may be preferred over waiver of hearing, since if the client participates in treatment and is discharged, the order of commitment will be vacated, thereby avoiding the substantial collateral consequences associated with an order of civil commitment.

When the client does not want a hearing, counsel may suggest that the client waive the hearing, in writing, pursuant to G.L. c. 123, § 6(b). Such a waiver does not take away the client's right to a hearing. The client agrees to the commitment but retains the right to request a hearing, for good cause shown, at any time during the period of commitment. G.L. c. 123, § 6(b); *see In re J.B.*, 2014 Mass. App. Div. 233 (court does not have discretion to deny client's otherwise valid waiver of hearing). With a waiver, counsel may be able to negotiate for a shorter period of commitment. If the initial hearing is waived and no hearing is conducted during the period of commitment, the client cannot be recommitted without a hearing. G.L. c. 123, § 8(d).

In authorization to treat (*Rogers*) cases, counsel should attempt to convince the petitioner of the client's competence to consent to the treatment. If the petitioner is not convinced, counsel must argue that the client is competent. If the client is accepting treatment, counsel should rely on the definition of informed consent and regulations regarding prescription and acceptance of antipsychotic medications in their arguments. 104 C.M.R. §§ 27.02, 27.10(1); DMH Medication Education, Capacity Policy No. 14-01 (July 1, 2014).

If the court finds the client is competent, the proceeding terminates and the client can accept or refuse the treatment. If the court finds that the client is not competent, the substituted judgment portion of the hearing commences. While the client's expressed preference will be a significant factor to be considered by the court (*see Guardianship of Roe*, 383 Mass. 415, 444–45 (1981)), counsel must present all reasonable alternatives to the proffered treatment for the court's consideration. *See In the Matter of Moe*, 385 Mass. at 567; *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. at 757; *cf.* Mass. R. Prof. C. 1.14. Counsel should present evidence of past experiences on certain medications and explain any increased risks due to underlying medical issues and ultimately argue, at a minimum, for a narrowly tailored and amended treatment plan.

While the default position of adhering to the client's expressed (albeit inadequately considered) decision may seem reasonable, admission to a psychiatric facility and treatment with antipsychotic medication absent the true informed consent of the client are substantial deprivations of liberty and pose a risk of substantial harm to the client.

Rule 1.14 of the Massachusetts Rules of Professional Conduct provides guidance to attorneys regarding their ethical responsibilities in dealing with clients with diminished capacity. The rule provides that, as with other clients, attorneys generally should follow the wishes of their cognitively, emotionally, or otherwise impaired clients, and provides suggestions as to steps that might be taken when an attorney has serious doubts about a client's ability to competently direct litigation or other legal matters. The rule recognizes, however, that in some circumstances, mental health proceedings specifically noted among them, such a course of action might be impermissible.

> Such circumstances arise in the representation of clients who are competent to stand trial in criminal, delinquency and youthful offender, civil commitment and similar matters. Counsel should follow the client's expressed preference if it does not pose a risk of substantial harm to the client, even if the lawyer reasonably determines that the client has not made an adequately considered decision in the matter.

Mass. R. Prof. C. 1.14, cmt. 7 (taking protective action).

§ 6.3 COUNSEL'S ROLE AFTER DISPOSITION

After the entry of judgment, counsel should meet with the client and explain the court's order, the appellate options, and, if requested, initiate an appeal. CPCS Performance

Standard § 4.G, ¶ 14; CPCS Performance Standard § 4.H, ¶ 14. This should be done in person and confirmed in writing to the client as soon as possible. Trial counsel must immediately notify CPCS of the filing of an appeal in order that appellate counsel may be assigned.

§ 6.4 INDEPENDENT FORENSIC EXAMINATIONS

Given the deference typically accorded psychiatrists and psychologists by courts, it is extremely difficult for a client to prevail without testimony from a forensic expert. Counsel always should consider retaining an independent expert to examine the client, assist counsel in the preparation of the case, and, where appropriate, testify at the hearing. The testimony of a forensic expert will be helpful, if not essential, in virtually all proceedings. Failure to consider hiring an expert can be ineffective assistance of counsel. *Commonwealth v. Millien*, 474 Mass. 417, 429–39 (2016). Even with the assistance of an independent medical expert (IME), it is difficult to prevail because the courts are often deferential to the hospital's treating clinician. When an expert is not used, counsel should be aware of and prepared to argue that "the law should not, and does not, give the opinions of experts on either side of an issue the benefit of conclusiveness, even if there are no contrary opinions introduced at trial." *Commonwealth v. Rosenberg*, 410 Mass. 347, 357–58 (1991) (internal citations omitted).

Counsel should always discuss with their client the benefit and purpose of retaining an expert to evaluate the client, assist counsel in the preparation of the case, and, where appropriate, testify at the hearing. Even if an expert is unable to testify on behalf of the client in the commitment hearing, they may be able to testify in the G.L. c. 123, § 8B proceeding regarding the client's capacity to make informed medical decisions; the efficacy of the medications and dosages requested on the treatment plan, especially when electroconvulsive therapy (ECT) is requested; or the side effects from medications, which can be a significant issue for clients. Even after advice from counsel about the advantage of an expert, some clients may choose not to retain an expert for various reasons. It is appropriate and still client-centered for counsel to retain an expert for purposes other than examining the client, such as to assist by evaluating the strength of the hospital's case, consult about cross-examination, and to help in the evaluation of Section 8B petition and treatment.

Part of the discussion with the client as to whether to retain an IME is the likely delay in the commitment trial while the clinician conducts an examination and formulates an opinion. While a delay will not adversely impact the client's liberty interests in an authorization-to-treat proceeding under G.L. c. 123, § 8B or a guardianship proceeding under G.L. c. 190B, there may be a significant impact in a commitment case, since the client will be retained at the facility pending hearing. At the initial meeting with the client regarding whether to retain an IME, counsel must secure the client's assent to a continuance to retain the IME in order to have sufficient time to prepare with the assistance of the IME. Counsel should contact petitioner's counsel to find out the petitioner's position on a continuance, as it is simpler to file an assented-to motion to continue. If the petitioner does not assent to a continuance, counsel must file a motion to continue. Unless good cause can be demonstrated by the court for a denial of a

motion to continue, a respondent is entitled to an initial request for a continuance. *See In the Matter of N.L.*, 476 Mass. 632 (2017) (holding the first continuance request is mandatory if denial interferes with the respondent's ability to prepare a meaningful defense).

When the services of an IME are sought, counsel must file a motion for funds under G.L. c. 261, § 27C (the Indigent Court Costs Act, or ICCA) as soon as possible. Under the ICCA, the court must authorize the expenditure of the funds necessary to secure the services of an independent clinician where these services are reasonably necessary to assure that the client is able to present as effective a defense as would be available to a person of means in the same circumstances. G.L. c. 261, § 27C, ¶ (4); *Commonwealth v. Matranga*, 455 Mass. 45, 50 (2009); *In re Edwards*, 464 Mass. 454, 461 (2013); *Commonwealth v. Lockley*, 381 Mass. 156 (1980); *see, e.g.*, *Guardianship of a Mentally Ill Person*, Mass. App. Ct. No. 85-0018 Civ. (Dreben, J., Jan. 28, 1985) (reversing the denial of funds for expert services finding that the services were reasonably necessary).

The funds come from money allocated by the state legislature for the Committee for Public Counsel Services, and counsel appointed by CPCS, to provide services on behalf of indigent clients. *See* G.L. c. 261, § 27A. Some courts are satisfied by a motion for funds accompanied only by an affidavit signed by counsel. Other courts require counsel to file the affidavit of indigency and supplementary forms issued by the Supreme Judicial Court, completed and signed by the client. *See generally* G.L. c. 261, §§ 27A–27G (ICCA); https://www.mass.gov/lists/court-forms-for-indigency. Most courts allow these motions to be filed by fax, and decide them quickly without requiring hearings. These are ex parte motions. *See Commonwealth v. Dotson*, 402 Mass. 185, 187 (1988) (prosecution has no role in consideration of defendant's motion for funds); *see also* Dist. Ct. Standards 3:07, 8:07.

Should the court deny a motion for funds or authorize an insufficient amount for the services of an independent clinician, an expedited appellate procedure is available to counsel. Where the denial occurs in the District, Juvenile, or Boston Municipal Court Department, the appeal is to the appropriate appellate division, while the appeal is to a single justice of the Appeals Court in the case of a denial in the Probate and Family or Superior Court Department. G.L. c. 261, § 27D.

The information gathered and the opinions formed by an independent clinician belong to the client and are neither discoverable by the petitioner nor to be shared with the court unless and until counsel decides to use the information and opinions at trial. *Thompson v. Commonwealth*, 386 Mass. 811, 819 (1982). The court may not draw any adverse inferences from counsel's decision not to use the testimony of the clinician or report at trial. *See* Dist. Ct. Standards 3:07, 8:07.

§ 6.5 ACCESS TO CLIENTS, CLIENT RECORDS, AND DISCOVERY

§ 6.5.1 DMH and Private Facilities

Where a client resides in a Department of Mental Health or private facility, counsel and the client must be afforded the opportunity to

- meet privately "at any reasonable time," 104 C.M.R. § 27.13(6)(e);
- speak confidentially by telephone, 104 C.M.R. § 27.13(6)(a); and
- exchange unopened, uncensored mail, 104 C.M.R. § 27.13(6)(b).

Counsel also must be permitted to review and copy the client's records in the possession of a facility. G.L. c. 123, § 36; 104 C.M.R. § 27.16(8)(c).

§ 6.5.2 Bridgewater State Hospital

Attorneys may visit clients at Bridgewater in general population during regular visiting hours and at any other time between 9:00 a.m. and 8:30 p.m. daily. See **Appendix B**, Attorney Access to Clients at Bridgewater State Hospital. Counsel must be afforded access to the client's entire record. See **Appendix C**, Brockton District Court Standing Order on CPCS Access to Bridgewater.

§ 6.5.3 Practice Advisory

In most instances, counsel, working through petitioner's counsel, will be afforded reasonable access to the client, the client's records, and hospital staff familiar with the client's care and treatment. However, when necessary, counsel should rely on applicable discovery procedures to obtain pertinent documents and information.

Since the Massachusetts Rules of Civil Procedure are not applicable to mental health proceedings in the District or Municipal Court Departments, counsel must request leave of the court when filing appropriate motions. Hospitals will not provide copies of records from other facilities, even when relying on them in support of a commitment petition. To ensure access to these types of records, counsel should file a motion to compel discovery. When counsel desires to speak with members of the client's treatment team, best practice is to contact petitioner's counsel and request access. DMH facilities now require permission from counsel before speaking with social workers. If counsel needs to obtain relevant records from other facilities, counsel should have the client sign a release of information for that facility.

For Bridgewater State Hospital records, counsel must make two phone calls, both at least one day before counsel wants to view or retrieve records. To obtain legal records, such as DOC records, court documents, and evaluations, counsel should call the legal records department. Requesting all DOC records is easier than going in to view and select records. For medical records, counsel must call the medical records department at least one day in advance to make an appointment to view or pick up medical records.

With the change to electronic medical records it is preferred that counsel request all records instead of selecting specific documents.

In proceedings in the Probate and Family Court Department and the Juvenile Court Department, discovery is conducted pursuant to the Massachusetts Rules of Civil Procedure. *See* Mass. R. Civ. P. 26–37. Thus, depositions (Rules 30 and 31), interrogatories (Rule 33), requests for the production of documents (Rule 34), and requests for admissions (Rule 36) may all be utilized without leave of the court.

§ 6.6 EVIDENTIARY MATTERS

There are several evidentiary issues that are significant in virtually every mental health proceeding: hearsay and expert testimony. The District Court Standards require the application of the formal rules of evidence in commitment and medical treatment hearings. Dist. Ct. Standard 5:01 ("Chapter 123 proceedings are formal judicial determinations in which a substantial deprivation of liberty is at stake and there are no statutory provisions or case decisions suspending the rules of evidence"). For specific rules, which mirror some of the following rules, see Massachusetts Guide to Evidence, Section 1117. Civil commitment hearings for mental illness.

§ 6.7 HEARSAY

Because the rules of evidence apply to mental health cases, an out-of-court statement offered to prove the truth of the matter asserted is inadmissible absent a recognized exception as provided by case law, statute, or rule prescribed by the Supreme Judicial Court. Mass. G. Evid. §§ 801(c), 802; Dist. Ct. Standards 5:02, 10:02; *cf. Santos, petitioner*, 461 Mass. 565, 568 (2012) (application of rules of evidence in sexually dangerous person commitment proceedings pursuant to G.L. c. 123A).

§ 6.8 SIGNIFICANT EXCEPTIONS TO THE HEARSAY RULE

Two exceptions to the hearsay rule are of importance in mental health proceedings where the availability of the declarant is immaterial: business and hospital records. *See* Mass. G. Evid. § 803(6). Records in the petitioner's possession, whether those of the facility itself or those of other facilities and hospitals in which the client may have been previously treated, will typically constitute the most significant source of information regarding mental illness, likelihood of serious harm, and treatment needs. Defense counsel must be familiar with and understand both the hospital records exception and the rules regarding what may be hearsay within those records.

The rule provides, in part, that hospital *records* "kept by hospitals pursuant to G.L. c. 111, § 70, shall be admissible as evidence so far as such records relate to the treatment and medical history of such cases. . . ." Mass. G. Evid. § 803(6)(B).

Keep in mind that it is the records, not a witness's statement about the contents of the records, which are admissible. Statements by witnesses about the contents of hospital

records, if offered for the truth of what is in the records, are hearsay and objectionable, unless another exception applies. It will be up to the defense attorney to be prepared to evaluate the witness's testimony to determine if they will object to hearsay.

For example, statements relating to prior admissions and the current admission may be admissible if there are no other evidentiary infirmities. Demographic information (e.g., the client's age, gender, race, or physical condition upon admission) may be admissible, as may the fact of the admission. Counsel should try to determine from petitioner's counsel if they intend to elicit information from their witnesses regarding prior admissions and secure records of the prior admissions. The relevance of prior admissions is always an issue that counsel must consider. The reason for an admission and diagnoses noted in the record may be admissible if the client's right to prevent the introduction of privileged communications is not implicated. *Commonwealth v. Clancy*, 402 Mass. 664 (1988); *Adoption of Saul*, 60 Mass. App. Ct. 546, 553 (2004) (diagnostic term admissible if content of privileged communications not revealed or conveyed; diagnoses of "schizophrenia" and "schizoaffective disorder" not error); *Adoption of Abigail*, 23 Mass. App. Ct. 191, 198–99 (1986) (holding that objective observations by a psychotherapist, social worker, nurse, or other party recorded in the medical records are admissible so long as they do not imply the contents of any privileged information); *see also Commonwealth v. Kobrin*, 395 Mass. 284, 294 (1985). However, information provided by other than those with an obligation to record such information is hearsay and generally inadmissible.

Records required to be kept by a mental health facility (*see* G.L. c. 123, § 36) or a hospital (*see* G.L. c. 111, § 70) relating to the client's treatment and medical history are admissible into evidence. G.L. c. 233, § 79. Section 79 makes it unnecessary for the writer of any particular entry in the record to appear and testify regarding the information contained in those records. However, it does not, by itself, make everything found in the record admissible.

A hospital record is admissible at trial if the trial judge finds that

- it is the type of record contemplated by G.L. c. 233, § 79;
- the information is germane to the patient's treatment or medical history; and
- the information is recorded from the personal knowledge of the entrant or from a compilation of the personal knowledge of those under a medical obligation to transmit such information.

Bouchie v. Murray, 376 Mass. 524, 531 (1978); *see also Commonwealth v. Cassidy*, 470 Mass. 201, 216 (2014); Greaney, "Massachusetts Hospital Records Exception to the Hearsay Rule," 64 *Mass. L. Rev.* 33 (1979); Mass. G. Evid. § 803(6). "[T]he business records hearsay exception in [G.L. c. 233,] § 78 may not be used to expand the scope of the hearsay exception for hospital medical records." *Commonwealth v. Irene*, 462 Mass. 600, 616 (2012). "The admissibility of statements in medical records is limited by the provisions in G.L. c. 233 relating to hospital records, including §§ 79 and 79G." *Commonwealth v. Irene*, 462 Mass. at 616.

An entry based upon information related to the entry writer by another hospital employee, who observed a client's behavior and who had the responsibility to report such observations, may be admissible even though the entry writer does not testify. Information contained in a medical record that is recorded by or obtained from an unidentified source may be admissible if the substance of the information and the circumstances surrounding its collection indicate that the source must have had firsthand knowledge of the events or circumstances and must have been under an obligation to report or record the events or circumstances. *See Bouchie v. Murray*, 376 Mass. at 531; *Commonwealth v. Francis*, 450 Mass. 132, 139 (2007) (all or portions thereof may be offered in evidence by the proponent, subject to objection by the adverse party on any grounds other than authenticity and hearsay); *cf. Doyle v. Dong*, 412 Mass. 682 (1992).

For example, in a commitment hearing, the petitioner proffers two entries from the client's record, both written by Nurse Jones. The first states, "I saw client strike patient Smith." This entry is admissible under G.L. c. 233, § 79, since the client's behavior may be relevant to the treatment and the writer would be permitted to describe the incident if called to testify at a hearing. Another entry states, "I was told by patient Smith that he was struck by client." This entry is not admissible under Section 79, since Nurse Jones would not be permitted to testify to this hearsay if called to testify.

The entry may be admissible if it is a statement of a third person, offered for reasons other than to prove the truth of the matter contained therein. If the statement is that of a third person and is offered for its truth, it must come within another exception to the hearsay rule or the general principles of G.L. c. 233, § 79 to be admissible. For example, information related to a patient's medical history made by a person having an intimate relationship with the patient and based upon that person's firsthand observations or knowledge will be admissible because of its inherent reliability. Thus, that portion of an entry that contains the dates of a patient's prior admissions to mental health facilities, as related to hospital staff by the patient's parent or spouse, will be admissible. However, the parent's or spouse's statements concerning information related by staff at such facilities will not be admissible. *Bouchie v. Murray*, 376 Mass. at 531.

The exception created by G.L. c. 233, § 79 removes the first layer of hearsay—the failure of the entry writer to appear in court to testify. Information that is otherwise inadmissible (e.g., hearsay, *see, e.g.*, *Adoption of Seth*, 29 Mass. App. Ct. 343 (1990) (out-of-court diagnosis, inadmissible in absence of exception to hearsay rule, not admissible as portion of hospital record)), privileged (*see, e.g.*, *Usen v. Usen*, 359 Mass. 453 (1971) (privileged communications not rendered admissible by inclusion in hospital record)), irrelevant, or immaterial (e.g., information that does not pertain to diagnosis or treatment of mental illness or likelihood of serious harm sought to be admitted in commitment proceeding)) will not be made admissible merely by its inclusion in the record, unless all evidentiary infirmities are overcome. "[E]vidence based on a chain of statements is admissible only if each out-of-court assertion falls within an exception to the hearsay rule." *Commonwealth v. McDonough*, 400 Mass. 639, 643 n.8 (1987); *Commonwealth v. Wright*, 469 Mass. 447, 465 (2014). The medical records exception to the hearsay rules is premised upon the reliability of statements recorded in a medical record for care and treatment purposes. It does not create an exception to

the hearsay rule for third-party statements that are facially unreliable. Voluntary statements of third parties that are unrelated to the patient's care and treatment should not be admitted into evidence even though they may be recorded in a medical record. *Bouchie v. Murray*, 376 Mass. at 531.

§ 6.8.1 Statements by Clients Are Not Hearsay

Out-of-court statements made by clients (i.e., respondents) are admissible when proffered by the petitioner (i.e., admission by party-opponent) through the testimony of a witness to such statement or by means of another exception to the hearsay rule (e.g., the hospital records exception). *See* Mass. G. Evid. § 801(d)(2)(A); *Evidence* (20 *Massachusetts Practice Series*) § 801.16 (3d ed.); Brodin & Avery, *Massachusetts Evidence* § 8.6.1 (2017) (statement of party admissible when offered by opponent if not objectionable on grounds other than hearsay). Among the grounds that might render a client's out-of-court statements inadmissible, the most common is the psychotherapist-patient privilege.

The following statements offered against your client are not excluded by the hearsay rule:

- the client's own statement; and
- a statement of which the client has manifested an adoption or belief in its truth.

Mass. G. Evid. § 801(d)(2).

§ 6.8.2 Practice Advisory

Counsel should ascertain from petitioner's counsel what, if any, portions of the records will be proffered at hearing. Where there is no question as to the admissibility of an entry, counsel should stipulate to its introduction. Counsel should move to exclude those entries that do not fall within the parameters of G.L. c. 233, § 79, as described above, or may be otherwise inadmissible. Where such a motion to exclude is denied, counsel must object when the entry is proffered at hearing in order to preserve the client's right to appeal its admission.

As with hospital records, discussed above, the business records exception removes only the first layer of hearsay—the failure of the entry writer to appear in court to testify. Information that appears in an entry within an agency's records that was provided by someone other than the entry writer will not be admissible under G.L. c. 233, § 78 unless it falls within some other exception to the hearsay rule. For example, statements made by another person to a police officer describing a client's behavior that were contained in the officer's police report will be admissible at hearing only if they fall within another exception to the hearsay rule. *Kelly v. O'Neil*, 1 Mass. App. Ct. 313 (1973) (exception for each level of hearsay required before statements in police report admissible).

§ 6.9 EXPERT WITNESSES AND OPINION TESTIMONY

Section 702 of the Massachusetts Guide to Evidence has long been an important source for the rules of evidence on expert testimony. In 2018, the guide added Section 1117, Civil Commitment Hearings for Mental Illness. When representing clients in civil commitment cases, reference should be made to both Sections 702 and 1117.

The rules provide that expert opinion testimony, whether by a treating psychiatrist or any other witness, is admissible if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. "'The crucial issue,' in determining whether a witness is qualified to give an expert opinion, 'is whether the witness has sufficient "education, training, experience and familiarity" with the subject matter of the testimony.'" *Commonwealth v. Frangipane*, 433 Mass. 527, 533 (2001) (quoting *Commonwealth v. Richardson*, 423 Mass. 180, 183 (1996)); *Reckis v. Johnson & Johnson*, 471 Mass. 272, 292 (2015).

If the court finds that the witness is qualified, then the expert testimony is admissible if

- the expert witness testimony will assist the trier of fact;
- the facts or data in the record are sufficient to enable the witness to give an opinion that is not merely speculation;
- the expert opinion is based on a body of knowledge, a principle, or a method that is reliable; and
- the expert has applied the body of knowledge, the principle, or the method in a reliable manner to the particular facts of the case.

Mass. G. Evid. §§ 702, 1117(c); *see Commonwealth v. Lanigan*, 419 Mass. 15, 26 (1994) (adopting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993)); *see also* Mass. G. Evid. § 702 (five foundation requirements); *Commonwealth v. Barbosa*, 457 Mass 773, 783 (2010) (explaining the five foundation requirements).

The judge, acting as gatekeeper, is responsible for making the preliminary assessment of whether the theory or methodology underlying the proposed testimony is sufficiently reliable to be admissible. *Commonwealth v. Camblin*, 478 Mass. 469, 475 (2017) (citing *Commonwealth v. Shanley*, 455 Mass. 752, 761 (2010)).

§ 6.9.1 Purpose of Opinion Testimony

Opinion testimony within a witness's field of expertise is admissible if it will aid the fact finder in reaching a decision on subject matter not within the fact finder's common knowledge and experience. "The role of an expert witness is to help [the trier of fact] interpret evidence that lies outside of common experience." *Commonwealth v. Tanner*, 45 Mass. App. Ct. 576, 581 (1998). Where there is sufficient evidence of information relied on by an expert in formulating an opinion, the expert may offer an opinion as to an ultimate factual issue (e.g., whether the client is mentally ill). *See, e.g.*, *Commonwealth v. Gomes*, 355 Mass. 479, 482–83 (1969).

§ 6.9.2 Qualification as an Expert

To be qualified as an expert and offer an opinion, the court must find that the expert possesses sufficient skill, knowledge, and experience in the professional discipline within which the specific issue in question lies. The key issue is whether the witness has sufficient education, training, experience, and familiarity with the subject matter of the testimony. *Commonwealth v. Richardson*, 423 Mass. 180, 183 (1996). That a witness practices within a particular discipline (e.g., psychiatry, psychology) does not, in and of itself, establish expertise regarding the specific issue in question. The witness's professional qualifications must be examined, both as to standing within the discipline and as to their expertise regarding each issue for which the testimony is proffered (e.g., the existence of mental illness, the likelihood of harm in the future, or the appropriateness of less restrictive treatment settings). The expert should be permitted to offer an opinion only within their scope of expertise. *See* Dist. Ct. Standards 5:03, 10:03. The trial judge should enforce the boundaries between the areas of expertise within which the expert is qualified and areas that require different training, education, and experience within which the expert is not qualified. *Commonwealth v. Frangipane*, 433 Mass. 527, 533 (2001) ("'The crucial issue,' in determining whether a witness is qualified to give an expert opinion, 'is whether the witness has sufficient "education, training, experience and familiarity" with the subject matter of the testimony'" (citations omitted)); *see also Reckis v. Johnson & Johnson*, 471 Mass. 272, 292 (2015).

> Whether an expert determined to be qualified in one subject is also qualified to testify in another, related subject will depend on the circumstances of each case, and, where an expert has been determined to be qualified, questions or criticisms as to whether the basis of the expert's opinion is reliable go to the weight, and not the admissibility, of the testimony.

Commonwealth v. Crouse, 447 Mass. 558, 569 (2006). The trial judge may decide which qualifications are necessary in order for a witness to offer expert testimony; such a determination will be reversed only for an abuse of discretion or an error of law. *Comm'r v. Devlin*, 365 Mass. 149 (1974); *Comm'r v. Spencer*, 212 Mass. 438 (1912).

§ 6.9.3 Practice Advisory

Counsel should inquire as to the proffered expert's educational training qualifications, as well as clinical experience and experience testifying as an expert witness. A curriculum vitae of the proffered witness should always be provided to the court and opposing counsel.

§ 6.9.4 Reliability of Expert's Methodology

Where the proffered opinion testimony is challenged, the judge must determine "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in

issue." *Commonwealth v. Lanigan*, 419 Mass. 15, 26 (1994) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993)). Under the *Daubert–Lanigan* standard, a judge considering a motion to introduce expert testimony initially considers a nonexclusive list of five factors. *See Commonwealth v. Powell*, 450 Mass. 229, 238 (2007). Among these factors are whether the scientific theory or process

- has been generally accepted in the relevant scientific community;
- has been, or can be, subjected to testing;
- has been subjected to peer review and publication;
- has an unacceptably high known or potential rate of error; and
- is governed by recognized standards.

A judge has "broad discretion" to weigh these factors and to apply varying methods to assess the reliability of the proffered testimony, depending upon the circumstances of a particular case; in some instances, certain factors may be inapplicable. *Commonwealth v. Camblin*, 478 Mass. 469, 475–76 (2017).

While all of these factors should be considered, the first (i.e., general acceptance) will likely be the most significant, if not the only, factor in the court's determination of scientific reliability and, therefore, admissibility. *Commonwealth v. Lanigan*, 419 Mass. at 26; *see Commonwealth v. Powell*, 450 Mass. 229, 238 (2007); *Commonwealth v. Patterson*, 445 Mass. 626, 636 (2005).

Where an opinion's admissibility is challenged, the proponent of the evidence must lay an adequate foundation "either by showing that the underlying scientific theory is generally accepted within the relevant scientific community, or by showing that the theory is reliable or valid through other means." *Commonwealth v. Sands*, 424 Mass. 184, 185–86 (1997). The abuse of discretion standard is to be applied upon appellate review of a trial court's determination of admissibility. *Canavan's Case*, 432 Mass. 304 (2000).

§ 6.9.5 Knowledge of Sufficient Facts or Data in the Record

Expert opinion may be based on

- facts observed by the witness or otherwise in the witness's direct personal knowledge;
- evidence already in the record or which the parties represent will be presented during the course of the hearing; and
- facts or data not in evidence if the facts or data are independently admissible in evidence and a permissible basis for an expert to consider in formulating an opinion.

Mass. G. Evid. §§ 702; 703, 1117(c).

This requirement means that the expert witness

> [m]ust have sufficient familiarity with the particular facts to reach a meaningful expert opinion. The relevant distinction is between an opinion based upon speculation and one adequately grounded in facts. Although a trial judge has some discretion in making that distinction, it may be an abuse of discretion to disallow expert testimony which is based upon reasonably adequate familiarity with the facts."

Fourth St. Pub, Inc. v. Nat'l Union Fire Ins. Co., 28 Mass. App. Ct. 157, 161 (1989) (citations omitted).

§ 6.9.6 Expert Predictions of Dangerousness

The role of an expert is crucial with regard to deciding whether "a person is mentally ill, and the discharge of such person from a facility would create a likelihood of serious harm." G.L. c. 123, § 8.

For the purposes of civil commitment, mental illness is defined as

> a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, but shall not include intellectual or developmental disabilities, autism spectrum disorder, traumatic brain injury or psychiatric or behavioral disorders or symptoms due to another medical condition as provided in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association, or except as provided in 104 C.M.R. 27.18, alcohol and substance use disorders; provided, however, that the presence of such conditions, co-occurring with a mental illness shall not disqualify a person who otherwise meets the criteria for admission to a mental health facility.

104 C.M.R. § 27.05(1). This is not the same as a mental disorder, which is defined in the fifth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (hereinafter "DSM-5") as

> [a] syndrome characterized by clinically significant disturbance in a person's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expected or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between individual and society

> are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above.

DSM-5 at 20. A comparison of the two definitions makes clear that mental illness requires more than a finding or opinion that a person suffers from a mental disorder, yet most forensic evaluators will look to the DSM-5 for aid in the evaluation. When they do, they must look to the diagnostic criteria and be mindful of the cautionary note in the "Cautionary Statement for Forensic Use of the DSM-5": "The definition of mental disorder included in the DSM-5 was developed to meet the needs of clinicians, public health professionals, and research investigators rather than the technical needs of the courts or legal profession." DSM-5 at 25. Finding that a person meets the criteria for any one of the myriad of disorders in the DSM-5 does not mean that the person has a mental illness as defined by DMH regulations. The latter requires a finding, by the court, of substantial disorder that grossly impairs the person's functioning and that the substantial disorder results in the likelihood of serious harm to self or others.

General Laws c. 123 § 1 defines "likelihood of serious harm" as

> (1) a substantial risk of physical harm to the person himself as manifested by evidence of, threats of, or attempts at, suicide or serious bodily harm;
>
> (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or
>
> (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community.

The ability of psychiatrists and psychologists to predict whether a particular client, if discharged from a psychiatric facility, will be violent is questionable. The best any expert can do is testify that of all the people with characteristics similar to the respondent, a percentage commit violent acts. However, risk assessments do not determine individual risk, and they are better used to identify those who fall into low-risk groups than those who are high risk. Fazel et al., "Use of Risk Assessment Instruments to Predict Violence and Anti-social Behavior in 73 Samples Involving 24,827 People: Systemic Review and Meta-analysis," 2012 *British Med. J.* 345. Few if any forensic experts keep track of the accuracy of their predictions and some may not use any established protocol to assess the risk of harm. With regard to assessment of any risk due to mental illness, there is little empirical evidence that predictions of future violence or self-harm can be achieved with any degree of confidence. *See* Cooke & Michie, "Limitations in Diagnostic Precision and Predictive Utility in the Individual Case: A Challenge to Forensic Practice," 34 *Law & Hum. Behav.* 259 (2010).

Counsel should object to a question seeking to elicit an expert's prediction as to whether a particular individual will be dangerous or violent if discharged. The methodology by which such a prediction can be made is not sufficiently reliable to constitute an admissible basis for psychiatric or psychological opinion testimony; therefore, the facility's putative expert should not be allowed to offer such an opinion. "Although research data might demonstrate with high confidence that a particular variable has an effect of interest [risk of harm], it typically cannot demonstrate with the same confidence that the particular variable had the effect of interest in a particular case." Faigman, "Evidentiary Incommensurability: A Preliminary Exploration of the Problem of Reasoning from General Scientific Data to Individualized Legal Decision Making," 75 *Brooklyn L. Rev.* 1115 (2010); *see also* Faigman, Monahan & Slobogin, "Group to Individual (G2i) Inference in Scientific Expert Testimony," 81 *U. Chi. L. Rev.* 417 (2014), see also Neal, et al. "Psychological Assessments in Legal Contexts: Are Courts Keeping "Junk Science" Out of the Courtroom?" Psychological Science in the Public Interest (published online February 15, 2020).

§ 6.9.7 Assessing Risk

Although the ability of forensic mental health witnesses to predict future dangerousness or violence is questionable, forensic psychiatrists or psychologists will attempt to assess the extent to which a particular client poses the type of risk necessary to meet the criteria for "likelihood of harm" pursuant to G.L. c. 123.

There are several approaches to risk assessment, a comprehensive review of which can be found in G. Melton, N. Poythress & C. Slobogin, *Psychological Evaluations for the Courts* 306–21 (Guilford 3d ed. 2007). There are three basic approaches to risk assessment, listed below. Each has its supporters, adherents, values, and deficits. Much has been and continues to be written about the various approaches, their validity, and usefulness.

- **Unstructured clinical judgment.** The evaluator relies on various data sources including an interview, psychological testing, records, prior history, and reports from others. The evaluator decides which information to use, and how it is organized and interpreted. The method is subjective, has no set structure, and varies among evaluators. It is convenient, easy to do, and widely used. However, it is influenced by evaluator bias and experience, has no known error rate, has been shown to be no better than chance, and is inconsistent between evaluators.
- **Actuarial assessment.** The evaluator relies on a standardized format that is based on empirical, evidence-based research. It is objective and uses predetermined factors that have been shown to correlate with increased risk. There is a plethora of risk assessment tools, but they are limited by the samples on which they are based and may not readily transfer from one population to another. They tend to be more reliable in assigning individuals to groups with known risk ratios, but it is difficult to assign that risk to an individual. They do not account for all the factors associated with risk, have varying rates of reliability, and are subject to inherent bias. Common types of actuarial assessment tools include the

Level of Services Inventory (LSI-R), the Static-99R, and the Violence Risk Appraisal Guide (VRAG).

- **Structured professional or clinical judgment.** Like the actuarial assessment, these are standardized evaluation tools that are based on research. Among the most common is the HCR-20 (Douglas et al., Historical-Clinical-Risk Management-20, Version 3 (HCR-20V3): Development and Overview (2014)). Guy, Laura S. & Catherine M. Wilson, "Empirical Support for the HCR-20: A Critical Analysis of the Violence Literature" (2007), *available at* https://escholarship.umassmed.edu/cgi/viewcontent.cgi?article=1361&context=psych_cmhsr. These tools allow for interpretation and professional judgment. However, they can still be influenced by bias and there is less inter-rater reliability. As they are often more complicated to administer, they can take more time.

Regardless of which approach is used, it is essential that the evaluator review the client's history, including family, school, work, military, and prior involvement with the mental health system. Numerous texts and articles address the conduct of evaluations for civil commitment, including Pinals & Mossman, *Evaluations for Civil Commitment* (Oxford University Press 2012); Drogin et al., *Handbook of Forensic Assessment* (Wiley & Sons 2011); Conroy & Murrie, *Forensic Assessment of Violence* (Wiley 2007).

(a) *Practice Advisory*

Counsel should be aware that each of the above-described assessment approaches is subject to criticism. For example, however valid a particular actuarial risk assessment tool may be as applied to the group studied, the predictive accuracy for any particular individual is questionable. Berlin, Galbreath, Geary & McGlone, "The Use of Actuarials at Civil Commitment Hearings to Predict the Likelihood of Future Sexual Violence," 15 *Sexual Abuse: J. Res. & Treatment* (2003) ("[a]ctuarial measures can potentially be very misleading if one incorrectly attributes the overall risk of a previously screened group to a specific individual within it"). Similarly, counsel must be aware of the subjects for which the data is gathered in formulating any particular actuarial risk assessment test. A test that is based upon the presumed violent propensities of teenage males suffering from delusional disorder will have little, if any, pertinence to a middle-aged female client. Hart, Michie & Cooke, "Precision of Actuarial Risk Assessment Instruments," *Brit. J. Psychiatry* 190 (Supp. 2007) (actuarial risk assessment instruments cannot be used to estimate individual's risk for future violence with any reasonable degree of certainty); *see also* Singh et al., "A Comparative Study of Violence Risk Assessment Tools," 31 *Clinical Psychology Rev.* 499; Fazel et al., "Use of Risk Assessment Instruments to Predict Violence and Antisocial Behaviour in 73 Samples Involving 24,827 People: Systematic Review and Meta-analysis," *British Med. J.* (July 24, 2012); Singh et al., "Structured Assessment of Violence Risk in Schizophrenia and Other Psychiatric Disorders: A Systematic Review of the Validity, Reliability, and Item Content of 10 Available Instruments," 37 *Schizophrenia Bulletin* 899–912 (2011) (studies showing that although risk assessment tools are widely used in clinical and criminal justice settings, their predictive accuracy varies depending on how they

are used; they seem to identify low-risk individuals with high levels of accuracy, but their use as sole determinants of release is not supported by current evidence).

As noted above, whatever approach is used, an expert's opinion as to a client's risk will be admissible only if the reasoning or methodology underlying the particular risk assessment tool utilized is "scientifically valid and . . . that reasoning or methodology properly can be applied to the facts in issue." *Commonwealth v. Lanigan*, 419 Mass. at 26 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993)). Where the admissibility of an opinion is challenged on this basis, the proponent of the evidence must lay an adequate foundation "either by showing that the underlying scientific theory is generally accepted within the relevant scientific community, or by showing that the theory is reliable or valid through other means." *Commonwealth v. Sands*, 424 Mass. at 185–86. The abuse of discretion standard is to be applied upon appellate review of a trial court's determination of admissibility. *Canavan's Case*, 432 Mass. 304 (2000).

Whatever the results of a risk assessment, however, the clinician should not be permitted to offer an opinion on whether the risk of physical harm would be substantial, or whether the risk of physical impairment or injury to the client themselves would be very substantial. Any conclusion regarding the substantiality of risk requires a determination by the trier of fact as to whether the risk of harm to self or others is substantial enough to warrant confinement for six months or one year in a psychiatric facility.

§ 6.9.8 Basis of Opinion

Since expert testimony plays a crucial role in determining the issues of mental illness and likelihood of harm, the most important evidentiary questions in these proceedings arise from the basis of an expert's opinion. A testifying expert will usually rely on the patient's medical records and interviews with family members and outside clinicians, therefore raising the same issues of hearsay and privilege that would constrain admission of those records and testimony into evidence. Mass. G. Evid. § 1117(c).

An opinion is admissible only if based upon information admitted into evidence or admissible as evidence if proffered and is of the type typically relied on by an expert in the witness's discipline. *DYS v. A Juvenile*, 398 Mass. 516, 526 (1986) (privilege applies where doctor testifies to diagnosis based on patient interviews, even if specific communications not revealed, therefore, opinion inadmissible). "These can include 'facts . . . testified to by [the expert witness] or . . . facts assumed in the questions put to [the witness] and supported either by admitted facts or by the testimony of other witnesses already given or to be given at the trial, or [10] . . . facts derived partly from one source and partly from the other.' *Burgess*, [citation omitted], quoting from *Department of Youth Servs. v. A Juvenile*, 398 Mass. 516, 527, 499 N.E.2d 812 (1986)." *Commonwealth v. Berry*, 80 Mass. App. Ct. 1115 (2011). Information that has not been admitted into evidence that would be admissible if proffered may be relied upon by an expert in formulating an opinion; however, the information itself is not admissible through the direct testimony of the expert. *See, e.g.*, *Commonwealth v. Boyer*, 58 Mass. App. Ct. 662 (2003); *Commonwealth v. Nardi*, 452 Mass. 379 (2008) (opinion admissible where based upon facts contained in official reports prepared by others—e.g.,

autopsy—however, opinion not admissible to extent based upon others' opinions contained in reports; others' opinions cannot be testified to on direct examination).

The following is a list of common permissible bases for expert opinion testimony in mental health proceedings:

- objective observations, whether made by the expert or by nurses, doctors, or other treatment professionals recording them in hospital records;
- medical history, including prior hospitalizations and diagnoses, if such diagnoses do not imply or contain privileged communications between a psychotherapist and clients, and such history is recorded in the medical records from a source with firsthand knowledge, meriting a presumption of reliability;
- conversations with the respondent, subject to prior notice and waiver of the psychotherapist-patient privilege; and
- facts or data that may be hearsay but are otherwise independently admissible, such as conversations about direct observations made by other clinicians, if not privileged or by family members.

Mass. G. Evid. §§ 702 and 1117(c) (2019) Testimony by Expert Witnesses (including Note "Five Foundation Requirements").

The following is a list of common bases for expert opinion testimony in mental health proceedings that are *not* permissible:

- hospital records or medical reports that contain or reference the contents of privileged communications;
- diagnoses or other information that necessarily imply the contents of privileged communications;
- conversations with the respondent not subject to prior warnings and a waiver of privilege; and
- other evidence that would be inadmissible if offered in the proceeding, including hearsay not noted above as permissible.

Mass. G. Evid. § 1117(c) (2019).

(a) *Practice Advisory*

Where formal or informal discovery leads counsel to believe that an adverse expert's opinion has been based on inadmissible information, a voir dire examination of the expert is warranted and appropriate. *DYS v. A Juvenile*, 398 Mass. at 532 (where party believes expert opinion based on inadmissible facts or data, party may request voir dire examination to determine basis of opinion); *Adoption of Seth*, 29 Mass. App. Ct. 343 (1990) (where opinion thought to be grounded in part on privileged information, voir dire examination recommended approach to determine basis of opinion). The advantage of voir dire examination as opposed to cross-examination, the traditional method of attacking the foundation of an opinion, is that the judge will not have heard

the opinion itself or the information upon which it is based and, thus, will not have formed an impression of the client. If inadmissible information has been relied upon, the evidentiary weight of the opinion will be diminished accordingly and, if the expert has substantially relied on such evidence, the opinion itself may be rendered inadmissible.

In conducting the examination, counsel first should elicit from the expert what sources were relied on in formulating an opinion. In doing so, counsel must be careful to focus the examination upon these sources and not permit the expert to divulge the actual information gleaned from these sources. The goal is to establish that the sources of the information render the information inadmissible at hearing and, therefore, that the information may not serve as the basis of the expert's opinion. Typically, these sources will include the client, facility clinicians, people familiar with the client and the reasons for the hospitalization, and medical records.

Evidence from each source must be admissible. The client, through statements made to, or behavior witnessed by, the expert, is likely to be the most significant source of information relied upon by the expert in formulating opinions of the client's mental status, clinical needs, acceptance of treatment, and ability to provide informed consent. All such statements and behaviors may be privileged and, therefore, inadmissible. Information obtained by the testifying expert from witnesses who are not testifying is inadmissible hearsay unless admissible under the hospital records or another exception to the hearsay rule. The fact that statements are contained within a hospital record or business record does not, in and of itself, make them admissible. Once the admissibility or inadmissibility of each piece of information that the expert has relied upon is established, counsel should then ask the expert if, based solely on the admissible information, the expert has an opinion about the existence of mental illness. If the answer is "no," counsel should move to exclude the opinion. If this motion is denied, counsel must object to the admission of the opinion when it is offered at hearing to preserve the client's appellate rights. If the answer is "yes," counsel may nevertheless move to exclude it; if this motion is denied, counsel should emphasize in closing argument the opinion's diminished evidentiary weight. Again, when the opinion itself is offered at hearing, counsel must object in order to preserve the client's appellate rights.

§ 6.10 PRIVILEGE

Communications between a client and certain clinical professionals relating to the diagnosis or treatment of a mental or emotional condition are generally privileged. Communications includes "conversations, correspondence, actions and occurrences relating to diagnosis." Clinicians to whom the privilege is applicable include

- physicians who devote a substantial portion of time to the practice of psychiatry, G.L. c. 233, § 20B;
- licensed psychologists, G.L. c. 233, § 20B (*see* G.L. c. 112, § 129A);
- graduates of, or students enrolled in, a doctoral degree program in psychology at a recognized educational institution working under the supervision of licensed psychologists, G.L. c. 233, § 20B;

- colleagues, agents, or employees of psychologists, whether professional, clerical, academic, or therapeutic, or graduates of, or students enrolled in, a doctoral degree program in psychology at a recognized educational institution working under the supervision of a licensed psychologist, G.L. c. 112, § 129A;
- psychiatric nurse mental health clinical specialists, G.L. c. 233, § 20B (*see* G.L. c. 112, § 80B);
- social workers, G.L. c. 112, § 135B;
- allied mental health and human services professionals, G.L. c. 112, § 172;
- sexual assault counselors, G.L. c. 233, § 20J; and
- domestic violence victims' counselors, G.L. c. 233, § 20K.

There is no general physician-patient privilege in Massachusetts. *Commonwealth v. Senior*, 433 Mass. 453, 457 n.5 (2001).

In most mental health proceedings, the communications at issue will be those between a client and a treating or forensic psychiatrist or psychologist or other member of the treatment team such as a social worker. The patient-psychotherapist privilege, as defined at G.L. c. 233, § 20B, may be applicable. For purposes of the privilege, communications are more than statements and include "conversations, correspondence, actions and occurrences relating to diagnosis or treatment before, during or after institutionalization, regardless of the patient's awareness of such conversations, correspondence, actions and occurrences, and any records, memoranda or notes [thereof]." G.L. c. 233, § 20B.

Absent a statutory exception, a client may prevent the disclosure of any privileged communications, if they are made under circumstances in which the client has a reasonable expectation of privacy. *Three Juveniles v. Commonwealth*, 390 Mass. 357, 361 (1983); *DYS v. A Juvenile*, 398 Mass. at 526 (privilege applies where doctor testifies to diagnosis based on interviews with patient, even if doctor reveals no specific communications). Such communications will not be made admissible under G.L. c. 233, § 79 (the hospital records exception to the hearsay rule), or by inclusion in the facility's record. *Usen v. Usen*, 359 Mass. 453 (1971). The purpose of an admission and diagnoses noted in the record will be admissible if the client's right to prevent the introduction of privileged communications is not implicated. *Commonwealth v. Clancy*, 402 Mass. 664 (1988); *Adoption of Saul*, 60 Mass. App. Ct. 546, 553 (2004) (diagnostic term admissible if contents of privileged communications not revealed or conveyed; diagnoses of schizophrenia and schizoaffective disorder not error).

§ 6.10.1 Practice Advisory

The privilege belongs to the client and must be raised by counsel at the appropriate time at hearing. If counsel or the client fails to make a timely objection to the introduction of such communications, the privilege will be waived. *See, e.g.*, *Adoption of Abigail*, 23 Mass. App. Ct. 191, 198 (1986). If not asserted at trial, the privilege may not be asserted on appeal. *Commonwealth v. Benoit*, 410 Mass. 506, 518 (1991).

Privilege and confidentiality are not the same. Confidentiality refers to the obligation not to divulge information about an individual learned in the course of a professional relationship. *See, e.g.*, G.L. c. 112, §§ 129A (psychologists), 135A (social workers). This duty applies in all situations. Privilege is an evidentiary rule that prohibits the disclosure of confidential information when the person is called as a witness. The duty not to disclose falls on the clinician and, in a judicial proceeding, serves as a testimonial disqualification. If called to testify, the clinician must decline to divulge confidential information, absent an applicable statutory exception. G.L. c. 112, §§ 129A, 135B; G.L. c. 233, § 20B. However, the client or counsel must invoke the privilege in order to prevent the clinician from testifying on the particular information in question. If the client fails to do so, or if the privilege is found to have been waived or to be otherwise inapplicable, the clinician will be required to divulge the information despite the confidentiality provisions to which they would otherwise be subject. If it is alleged that the privilege has been waived, counsel must inquire to ensure that the client's waiver of privilege was made knowingly, voluntarily, and intelligently. G.L. c. 123, § 8B(h); G.L. c. 112, § 135; *Commonwealth v. Lamb*, 365 Mass. 265, 269 (1974); *In the Matter of Laura L.*, 54 Mass. 853, 858–61 (2002); Dist. Ct. Standard 5:04; *see Commonwealth v. Waweru*, 480 Mass. 173, 184 (2018) (police presence during a psychiatric consultation, which allows the defendant to receive necessary medical attention while protecting the public and medical personnel, does not waive the psychotherapist-patient privilege).

§ 6.10.2 Exceptions to Privilege

While G.L. c. 233, § 20B contains a number of exceptions regarding the privileged communications, there are several that are particularly pertinent in mental health proceedings.

(a) *To Place or Retain in a Facility—G.L. c. 233, § 20B(a)*

The privilege will not apply and, therefore, a clinician may testify to, or base an opinion on, a client's communications where

> [i]n the course of [a clinician's] diagnosis or treatment of the patient, [the clinician] determines that the patient is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the patient against himself or another person, and on the basis of such determination discloses such communication either for the purpose of placing or retaining the patient in such hospital, provided however that the provisions of this section shall continue in effect after the patient is in said hospital, or placing the patient under arrest or under the supervision of law enforcement authorities.

G.L. c. 233, § 20B(a); *see also* G.L. c. 112, § 129A (psychologists); G.L. c. 112, § 135B(a) (social workers).

The purpose of this exception is to make the privilege inapplicable in some commitment proceedings. Unlike proceedings under G.L. c. 123A regarding the civil commitment of sex offenders (*Commonwealth v. Lamb*, 365 Mass. 265 (1974)) and proceedings to extend jurisdiction of the Juvenile Court over youthful offenders under G.L. c. 120 (*DYS v. A Juvenile*, 398 Mass. 516 (1986)), the Supreme Judicial Court has held that this exception to privilege applies "to examinations, by a diagnosing or treating psychotherapist, of a patient involuntarily committed to a mental health facility pursuant to G. L. c. 123, § 12 (b)." *Walden Behav. Health v. K.I.*, 471 Mass. 150, 157 (2015).

In *Walden Behavioral Health v. K.I.*, the patient argued that the treating psychiatrist's testimony should not have been admitted at the commitment hearing where no *Lamb* warning was given (see § 6.10.2(b), Court-Ordered Evaluations, below). The argument was based on the requirements of G.L. c. 233, § 20B(b) (discussed in the next section). The Supreme Judicial Court held that Section 20B(b) did not apply to such testimony because it was not court-ordered and instead relied on the exception to privilege in Section 20B(a), which does not require a warning. This decision applies to communications that are made by a patient who is detained under G.L. c. 123, § 12(b). Counsel must consider whether other statutes or regulations bar the testimony as well.

For example, certain mental health practitioners are required, either by statute or by the ethical standards of their profession, to inform a patient of any limitations upon the confidentiality normally accorded patient communications, such as testimony at a judicial proceeding. Psychologists are required by statute, at the initiation of their professional relationship, to inform patients of the limitations on the confidentiality of their communications. G.L. c. 112, § 129A. Similarly, the Ethical Principles of Psychologists and Code of Conduct § 4.02 of the American Psychological Association require that

> (a) Psychologists discuss with persons (including, to the extent feasible, persons who are legally incapable of giving informed consent and their legal representatives) and organizations with whom they establish a scientific or professional relationship *(1) the relevant limits of confidentiality and (2) the foreseeable uses of the information generated through their psychological activities*. (Emphasis added.)

See also American Psychiatric Association, *Principles of Medical Ethics Applicable to Psychiatry* § 4(2), (6) (psychiatrists); American Academy of Psychiatry and the Law, *Ethics Guidelines for the Practice of Forensic Psychiatry* (adopted May 2005).

Unlike admissions under G.L. c. 123, § 12(b), authorization to treat petitions brought pursuant to G.L. c. 123, § 8B require that the patient must be informed that their communications may be used for the purpose of securing a court order. G.L. c. 123, § 8B(h); *Commonwealth v. Lamb*, 364 Mass. 265, 270 (1974); *Matter of T.M.*, 2017 Mass. App. Div. 99, 102; *In re Commitment of M.B.*, 2013 Mass. App. Div. 8, 11. In order for these communications to be admissible, the court must find that the patient has made a knowing, voluntary, and intelligent waiver. Since one purpose of a Section 8B petition is "to adjudicate the patient incapable of making informed decisions about

proposed medical treatment" (G.L. c. 123, § 8B(a)(1)), there is substantial question as to whether the patient can competently waive privilege. Similarly, a *Lamb* warning is required where a client's communications to a clinician, or expert opinions based on them, are used at a hearing in which authorization to treat with antipsychotic medication is sought in the Probate and Family Court. G.L. c. 190B, § 5-306A(e).

Unlike Section 12(b), evaluations ordered under G.L. c. 123, §§ 8B, 12(e), 15(e), 16, and 18 are ordered by the court and require a proper *Lamb* warning and waiver. If there is no warning as to the limits of confidentiality, the person may invoke the privilege and prevent a clinician from testifying to, or basing an opinion on, the client's communications.

The exception in Section 20B(a) will not be applicable to a person who is the subject of a proceeding under G.L. c. 123, § 12(e) (emergency three-day admission) or G.L. c. 123, § 35 (ninety-day commitment for alcohol or substance use disorder) and not in a hospital at the time of examination. In such a proceeding, an examination will be court-ordered, but not for the purpose of treatment. A *Lamb* warning and waiver will be required if the person's communications are to be used at hearing. *In the Matter of Laura L.*, 54 Mass. App. Ct. 853 (2002) (commitment under G.L. c. 123, § 12(e)).

(b) *Court-Ordered Evaluations—G.L. c. 233, § 20B(b)*

The privilege will not apply and a clinician may testify to, or base an opinion on, a client's communications

> [i]f a judge finds that the patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of a psychiatric examination ordered by the court, provided that such communications shall be admissible only on issues involving the patient's mental or emotional condition but not as a confession or admission of guilt.

G.L. c. 233, § 20B(b). The notification required under this paragraph is referred to as a *Lamb* warning. *See Commonwealth v. Lamb*, 365 Mass. 265 (1974); *see also In the Matter of Laura L.*, 54 Mass. App. Ct. 853 (2002) (warning required prior to examinations under G.L. c. 123, § 12(e)); G.L. c. 112, § 129A (psychologists); G.L. c. 112, § 135B(b) (social workers).

The requirement that a clinician give a *Lamb* warning before conducting an examination has been extended to include examinations of persons where the examination is conducted at the request of a facility or entity acting under the auspices of the Commonwealth and the person's communications, or expert opinions based on them, are sought to be used at a hearing in which the person's mental capacity will be at issue. *DYS v. A Juvenile*, 398 Mass. at 526 (recommitment of child to Department of Youth Services under G.L. c. 120). The court's reasoning as to the purpose of the exception is fully applicable in the context of commitment and authorization-to-treat proceedings

under G.L. c. 123, and, therefore, its interpretation of the exception should also apply in such proceedings.

By statute, a *Lamb* warning is required where a client's communications to a clinician, or expert opinions based on them, are used at a hearing in which authorization to treat with antipsychotic medication is sought in the Probate and Family Court. G.L. c. 190B, § 5-306A(e). Likewise, the statute requires a *Lamb* warning in District Court authorization to treat proceedings brought pursuant to G.L. c. 123, § 8B. *See* G.L. c. 123, § 8B(h).

§ 6.10.3 Mental or Emotional Condition Introduced by Client

The privilege will not apply and, therefore, a clinician may testify to, or base an opinion on, a client's communications where

> the [client] introduces his mental or emotional condition as an element of his claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between [client] and psychotherapist be protected.

G.L. c. 233, § 20B(c); *see also* G.L. c. 112, § 129A (psychologists); G.L. c. 112, § 135B(c) (social workers).

Thus, for example, a defendant's statements to a treating (not a forensic) psychiatrist were admitted over the defendant's objection where the defendant introduced his mental condition by raising an insanity defense and the court determined that the "interests of justice in disclosure outweighed the need to protect the defendant's otherwise confidential communications." *Commonwealth v. Seabrooks*, 433 Mass. 439, 448–49 (2001).

It is unclear whether this exception is applicable to proceedings under G.L. c. 123, § 9(b).

§ 6.11 GUARDIANSHIP PROCEEDINGS

The privileges established at G.L. c. 233, § 20B (psychotherapists) and G.L. c. 112, § 135A (social workers)

> shall not prohibit the filing of reports or affidavits, or the giving of testimony, pursuant to this part, for the purposes of obtaining treatment of a person alleged to be incapacitated; provided, however, that such person has been informed prior to making such communication that they may be used for such purpose and has waived the privilege.

G.L. c. 190B, § 5-306A(e).

§ 6.11.1 Practice Advisory

Where a client is not competent to "exercise or waive [the right to keep communications] privilege[d], a guardian shall be appointed to act in his behalf. A previously appointed guardian shall be authorized to so act." G.L. c. 233, § 20B; *see also* G.L. c. 112, § 135B (social workers). It will rarely be appropriate for counsel to assent to the appointment of a guardian for this purpose.

For purposes of the privilege, communications are defined as to include conversations, correspondence, actions, and occurrences relating to diagnosis or treatment. G.L. c. 233, § 20B. Behaviors that provide a psychotherapist with "a basis on which to render an evaluation of [a client's] mental health" will not be actions protected by the privilege. *Sheridan, petitioner*, 412 Mass. 599, 605 (1992); *Adoption of Abigail*, 23 Mass. App. Ct. at 198 (conclusions based on objective indicia admissible). A client's behavior will fall within the privilege only if made in response to a psychotherapist's inquiry during an examination. For example, a client's grimace in response to a psychiatrist's question about the client's feelings toward their father should be privileged as an "action [or] occurrence relating to diagnosis or treatment."

In all commitment proceedings under G.L. c. 123 (except, perhaps, in proceedings in Superior Court pursuant to G.L. c. 123, § 9(b)), a *Lamb* warning must have been given (and a proper waiver obtained) if the client's communications to an adverse clinician are to be admitted into evidence, or are to serve as the basis of the clinician's opinion, except for communications that were made to and used by a clinician to seek the client's three-day commitment pursuant to G.L. c. 123, §§ 12(a) and 12(b). (*But see, contra*, *Walden Behav. Care v. K.I.*, 471 Mass. 150 (2015)). Proceedings under G.L. c. 123, §§ 8, 15(e), 16, and 18 will involve clients who are institutionalized at the time of examination. Proceedings under G.L. c. 123, §§ 12(e) and 35 will involve noninstitutionalized clients examined pursuant to court order.

Similarly, in all guardianship proceedings, and in all substituted judgment proceedings in which authorization to treat with antipsychotic medication or another extraordinary modality is sought, a *Lamb* warning must have been given (and a proper waiver obtained) if the client's communications to an adverse clinician are to be admitted into evidence or are to serve as the basis of the clinician's opinion, again except for communications that were made to and used by a clinician to seek the client's three-day detention pursuant to G.L. c. 123, §§ 12(a) and 12(b).

A warning and waiver should be given in the following proceedings:

- authorization-to-treat proceedings under G.L. c. 123, § 8B; and
- Probate and Family Court substituted judgment proceedings under G.L. c. 190B.

Where an adverse clinician is asked to testify about a client's communications, or seeks to offer an opinion based, in whole or in part, on those communications, counsel should inquire about the following:

- whether the warning was given and given in a manner and form that the client could understand;
- whether the client was able to fully comprehend:
- the purpose of the examination;
- the uses to which the statements and the clinician's report might be put;
- that the person need not communicate with the clinician and may choose to answer some but not all questions posed by the clinician, *Sheridan, petitioner*, 412 Mass. 599 (1992);
- the consequence of the decision to forgo the privilege and communicate with the clinician; and
- the manner by which the clinician evaluated the client's ability to comprehend such information.

Similarly, where a witness's opinion is based, in whole or in part, on a client's communications made to a nontestifying clinician, or on the opinions of such other clinician, or where a nontestifying clinician's opinion itself is proffered through the witness, counsel should ask the witness whether the nontestifying clinician gave the client an appropriate warning, and, if not, or if the witness does not know, counsel should seek to exclude the testimony or opinion.

§ 6.12 WAIVER OF PRIVILEGE

Where a *Lamb* warning is required, a client's decision to waive privilege and speak with the evaluator must be knowing, intelligent, and voluntary. *See, e.g., Adoption of Carla*, 416 Mass. 510, 515 n.5 (1993); *In the Matter of Laura L.*, 54 Mass. App. Ct. 853 (2002); *see* Dist. Ct. Standard 3:03.

§ 6.13 COUNSEL'S ROLE AFTER DISPOSITION

After the entry of judgment, counsel should meet with the client and explain the court's order, the appellate options, and, if requested, initiate an appeal. This should be done in person and confirmed in writing to the client as soon as possible. Trial counsel must immediately notify CPCS of the filing of a notice of appeal, in order that appellate counsel may be assigned, by emailing CPCS an appellate intake form with a copy of the notice of appeal.

§ 6.13.1 Appeal—G.L. c. 123, § 9(a)

Pursuant to G.L. c. 123, § 9(a), the client should be advised that they have an automatic right to appeal the judgments of the trial court as to any errors of law that were made in the commitment or Section 8B proceedings to the Appellate Division of the District Court. Section 9(a) appeals are governed by the District/Municipal Courts Rules for Appellate Division Appeal. A notice of appeal must be filed with the trial court within ten days of the entry of the order on the docket. Counsel must advise their clients that

the appeal will not provide immediate relief or have any impact on their discharge because of the length of the pendency of the appeal, but if ultimately successful, the commitment order, finding of incompetency, and/or lawfulness of the substituted judgment determination could potentially be vacated and their medical record accordingly restored.

§ 6.13.2 Application for Discharge—G.L. c. 123, § 9(b)

The client should also be advised that at any time, a petition for review of commitment or application for discharge can be filed with the Superior Court, pursuant to G.L. c. 123, § 9(b), claiming that their continued commitment or the authorized treatment is no longer necessary or appropriate. While a client may file such a petition at any time, counsel should advise that the Superior Court is likely to dismiss the petition if filed too soon after the court hearing. This is because in such a petition, the client would have to show that there has been a substantial change in circumstances since the commitment hearing. *See Andrews, petitioner*, 449 Mass. 587 (2007). The client bears the burden of proof in such a hearing and therefore requires the assistance of an IME to evaluate the case, examine the client, and be able to testify on behalf of the client. Accordingly, counsel may suggest to the client that they will probably have more success by waiting at least thirty days before filing a Section 9(b) petition.