THE TRIAL COURT OF MASSACHUSETTS
DISTRICT COURT

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DISTRICT COURT ADMINISTRATIVE REGULATION No. 24-2

STANDARDS OF JUDICIAL PRACTICE, *INQUEST PROCEEDINGS*

This Regulation replaces and supersedes Administrative Regulation No. 1-90 and is effective June 10, 2024.

The provisions of the Standards of Judicial Practice applicable to Inquest Proceedings, as revised, are promulgated herewith for use in the District Court.

Honorable Stacey J. Fortes
Chief Justice of the District Court

Date: June 10, 2024

DISTRICT COURT DEPARTMENT OF THE TRIAL COURT

Administrative Office of the District Court

STANDARDS OF JUDICIAL PRACTICE

INQUEST PROCEEDINGS

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PLEASE NOTE THAT THESE STANDARDS DO NOT REFLECT CHANGES IN CASE LAW, STATUTES OR COURT RULES SUBSEQUENT TO THE PROMULGATION OF THESE STANDARDS ON JUNE 10, 2024.

Note:

The Standards on Inquest Proceedings were first promulgated by District Court Chief Justice Samuel E. Zoll in 1990. While there has been little new caselaw in the intervening thirty-four years, the relevant statutes have been considerably amended. As a result, a revision of the Inquest Standards has become necessary. The District Court Committee on Criminal Proceedings undertook the task of producing this revision with input from the Superior Court and the Boston Municipal Court. These Standards draw in part from the analysis of the statutory amendments undertaken by the Criminal Proceedings Committee under the leadership of Chief Justice Lynda Connolly.

The primary result of the statutory changes was to give the District Attorney greater control over the inquest process. When the 1990 Standards were promulgated, the medical examiner was required to notify the District Court, as well as District Attorney, if they believed a death may have been caused by the act or negligence of another. The District Court could choose to conduct an inquest, even if the District Attorney did not seek one. Now the medical examiner is required to notify the District Attorney and the statute provides that the District Court shall conduct an inquest only upon notice by the District Attorney (or Attorney General)[1]. Similarly, the statutory provision allowing the judge to appoint its own investigator was eliminated. The investigative resources of the District Attorney's Office obviate the need for an investigator. Based on these statutory changes, we have deleted or revised several of the "Preliminary Matters" Standards, from 2:00 through 2:10, and renumbered the remaining Standards to reflect current law and practices. We also made changes to Standards 4:02 though 4:04 and added Standard 4:05, Return of Inquest Exhibits. These changes clarify the terms of impoundment of inquest materials and set out the obligations of the inquest judge and the clerks in both the District and Superior Court in greater detail.

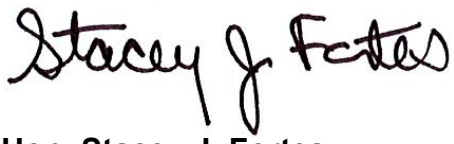
As Chief Justice Zoll noted when he promulgated the original Standards, "To the District Court judge, inquest jurisdiction represents a challenge both in terms of the unique nature of the proceedings and the special public scrutiny often attending the incidents at issue." As he also noted, there were no applicable procedural rules and a dearth of caselaw and scholarly analysis.

The unique character of the inquest procedure focuses on the investigatory role of the judge, and the fact that unlike virtually every other proceeding over which District Court judges preside, inquests are not adversarial. It is the judge who must control the procedure and ensure that all the relevant information is produced. The facts do not emerge from a clash of adversaries as they argue their cases and probe the weaknesses of their opponent's evidence. Rather, the judge is given the task of seeking out the relevant testimony and rejecting the irrelevant.

[1] Hereinafter, unless the context indicates otherwise, each reference to "District Attorney" applies equally to "Attorney General."

In most cases, the initiative in presenting evidence will be taken by the District Attorney. The Standards clarify the judge's role and the various duties involved, while at the same time recognizing the role of the District Attorney. The Standards address the practical problems presented in inquests, such as obtaining relevant evidence, scheduling hearings, and sequestering witnesses.

The Standards of Judicial Practice, while not mandatory, represent a qualitative judgment as to the best practices in the various aspects of inquest procedures. As such, each judge should strive for compliance with the Standards and should treat them as a statement of desirable practice which should be departed from only with good reason. References are made throughout the Standards to provisions of statutory and case law, which, of course, must be observed.



Hon. Stacey J. Fortes,
Chief Justice of the District Court
June 10, 2024

INQUEST PROCEEDINGS

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1:00 In General

The inquest is a procedure whose form and purpose are unique to District Court jurisdiction. The inquest is a process by which a judge investigates the circumstances of a death and issues a report setting forth their conclusions on several specific issues based on the evidence adduced at an inquest hearing.

Inquests, by their nature, often involve matters of heightened public concern. Accordingly, they should be conducted without unreasonable delay and with particular sensitivity to the requirements of the law and these Standards regarding privacy and proper procedure.

COMMENTARY

The inquest is a procedure of ancient origin. It is unique because the court, as opposed to an agency of the Executive Branch, is responsible for the initial determination as to whether a crime occurred. While governed by a number of statutory provisions and several cases, the standards and mechanics of holding an inquest are not thoroughly addressed by either. The purpose of these Standards is to analyze the requirements of applicable law, and recommend approaches to procedural questions that can arise, and provide a useful reference for District Court judges required to conduct these proceedings.

District Attorneys have discretion to determine when to request an inquest.

The procedures governing how inquests are initiated are set out in G.L. c. 38, §§ 3 through 7. See Appendix 1.

1:01 Nature and Purpose of an Inquest

An inquest is an investigatory procedure. Its purpose is to obtain information concerning whether a death may have been the result of a crime. It is not a prosecution. It is neither a criminal procedure, nor is it adversarial. There are no "parties" to an inquest, in the usual sense.

The goal of an inquest is to elicit evidence sufficient to enable the judge to reach conclusions about when, where, and by what means the death occurred, all material circumstances attending the death, and, if possible, the identities of the deceased and the person(s) whose unlawful act or negligence appears to have contributed to the death. The conclusions shall be set forth in a formal written report.

COMMENTARY

The current practice of conducting an inquest before a court is over a century old, originating in 1877. St. 1877, c. 200. Before 1877, inquests were conducted by coroners with juries of six persons. *Kennedy v. Justice of the Dist. Court of Dukes County,* 356 Mass. 367, 371 (1969).

However, the purpose and character of the inquest has not changed. As stated in the *Kennedy* case:

> An inquest is not a prosecution of anybody. It is not a trial of anyone. The pertinent statutory provisions exemplify a public policy that the inquest serves as an aid in the achievement of justice by obtaining information as to whether a crime has been committed.
>
> *Kennedy,* 356 Mass. at 373.

Inquest proceedings are not accusatory, and they should be regarded as investigatory. *Id.* at 376.

The investigative character of an inquest is key to understanding the judge's role and the procedures that should be followed, which are discussed in the Standards that follow.

1:02 The Judge's Role

The role of the judge conducting an inquest is investigatory. While the District Attorney will normally attend the inquest and examine witnesses, the judge remains responsible for ensuring that all relevant evidence is presented and that all relevant witnesses are heard.

COMMENTARY

The judge conducting an inquest is in an unfamiliar role. In all other proceedings, the judge, although they may actively inquire into the matter, is essentially in the posture of an umpire, standing between two competing adversaries. The role in an inquest is fundamentally different. Conducting an inquest has been held to be a "quasi-judicial" function. See *LaChapelle v. United Shoe Mach. Corp.,* 318 Mass. 166, 169 (1945), and cases cited.

Since the inquest is not adversarial in the usual sense, it follows that, in order to fulfill the investigatory function, it is the judge's responsibility as investigator to see that all relevant testimony and other evidence is produced. There is no parallel in inquests to the tactical decisions in adversarial proceedings whereby either party, consistent with the rules of evidence, may decide for itself not to present certain evidence or arguments. The judge must seek out and, where necessary, compel the presentation of all evidence it determines relevant.

The conduct of the inquest is addressed in detail in Standards 3:00-3:11.

1:03 The Role of the District Attorney

The District Attorney has the right to require an inquest be held and should normally be allowed to attend the inquest and examine witnesses. However, the primary role of the District Attorney at an inquest hearing is to assist the judge in the fulfillment of the judge's investigative responsibility. Since the inquest is not an adversarial proceeding, the judge should ensure that the District Attorney remains essentially neutral, and not act as the proponent or opponent of any particular proposition or point of view.

COMMENTARY

General Laws c. 38, § 8, states that the District Attorney may require an inquest to be held "in case of any death." The District Attorney's primary role is to assist the judge in investigating the circumstances of the death. As such, the judge can utilize the resources of the District Attorney's Office.

The nature of the proceeding is non-adversarial. While it is appropriate for the District Attorney to "go forward" in terms of initiating the presentation of evidence, this Standard stresses the judge's obligation to maintain the non-adversarial tone of the proceedings. These Standards take the position that, aside from allowing the District Attorney to examine witnesses (which should be interpreted to include cross-examination), the inquest judge has discretion over the manner in which the District Attorney proceeds. See G.L. c. 38, § 8; Standard 3:08.

1:04 The Role of the Attorney General

The Attorney General may initiate an inquest. When the Attorney General does appear, their role is the same as that of the District Attorney.

COMMENTARY

In the statutes providing for inquests, G.L. c. 38, §§ 8-11, there are references to the Attorney General as well as to the District Attorneys. For example, G.L. c. 38, § 8, empowers the Attorney General as well as the District Attorneys to require the court to hold an inquest. See *Shepard v. Attorney Gen.*, 409 Mass. 398, 402 (1991).

However, G.L. c. 38, §§ 3, 7, 10 and 11 speak only of the District Attorney and are silent with regard to the Attorney General. For example, the medical examiner is required only to notify the District Attorney if the death may have been caused by the act or negligence of another. Similarly, the medical examiner is only required by the statutory language to provide records of the investigation to the District Attorney. G.L. c. 38, § 7.

This Standard takes the position that the Attorney General may act at any stage of an inquest in place of a District Attorney. This position is based on the legal status of the Attorney General, the references to that office in the statutes pertaining to inquests, and the "interchangeability" of the official duties of the Attorney General and the District Attorneys. G.L. c. 12, § 27.

1:05 The Role of the Clerk

The role of the clerk is to facilitate the judge's investigation. The clerk is responsible for maintaining the record of the inquest and ensuring that the filings and recordings are impounded. The judge may request that the clerk communicate with the District Attorney and any counsel for the target or interested persons regarding scheduling and materials.

COMMENTARY

The clerk will fulfill all of the clerk's general duties including initiating and updating the case in MassCourts and updating the docket with dates, locations, and times of hearings, entering docket information pertaining to witnesses and attorneys, including a record of persons present at each hearing date, issuing summonses and notices as required, creating and maintaining audio recordings of the proceeding and related documentation, maintaining impounded documents, recordings and exhibits together with an exhibit list, maintaining the judge's report and the transcript of the proceedings, and docketing notices sent to and orders received from the Superior Court. The clerk will file the final report and transcript with the Superior Court. The clerk may assign an assistant clerk magistrate or sessions clerk to assist the judge.

1:06 Procedural Rules

There are no procedural rules of court applicable to the conduct of inquests. Since the proceedings are neither criminal nor civil, the rules of criminal and civil procedure are not controlling.

COMMENTARY

The only guidance on how inquests are to proceed is set forth in the statutes and the few relevant cases. These are discussed in the Standards that follow.

PRELIMINARY MATTERS

2:00 Notice Requiring an Inquest

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2:00 Notice Requiring an Inquest

The District Attorney may "require" that the District Court conduct an inquest, in the event of any death. G.L. c. 38, § 8.

COMMENTARY

The Chief Medical Examiner or designee may request the District Attorney to "direct" that an inquest be held. G.L. c. 38, § 8. Under G.L. c. 38, § 7, the medical examiner is obligated to make available any and all records pertaining to the investigation to the District Attorney. It is then up to the District Attorney to decide whether to "require" that the District Court hold an inquest. G.L. c. 38, § 8.

General Laws c. 38, § 8 does not specify how the District Attorney should notify the District Court of the need for an inquest. The practice has been and should continue to be for the District Attorney to send notice to the Chief Justice of the District Court. See Standard 2:03. At a minimum, the notice should identify the name of the deceased and, to the extent known, the date, time and place where they died, and the general circumstances surrounding the death.

See Appendix 2, Sample Notice Letter from District Attorney.

2:01 Requirement to Conduct an Inquest

The District Court is required to conduct an inquest if the District Attorney requests one from the court.

COMMENTARY

The statute provides that if the District Attorney "requires" an inquest, the court "shall thereupon hold an inquest." G.L. c. 38, § 8. No other mechanism is provided for initiating an inquest.

The judge may terminate the inquest or take such other action as deemed appropriate should the District Attorney, absent good cause, fail to respond in a timely manner to the judge's request for assistance or information deemed necessary to conduct the inquest. See Standards 1:03 and 2:04.

2:02 Court's Jurisdiction

The District Court has subject matter jurisdiction over inquests under G.L. c. 38, § 8. The inquest shall be held in the division of the District Court with jurisdiction over the place where the alleged act or negligence occurred. If the place of the alleged act or negligence is unknown, jurisdiction is governed by where the body was found.

COMMENTARY

In accordance with G.L. c. 277, § 57, the assigned court may still conduct the inquest if the place where the body was found and the place where the suspected act or negligence occurred are both within 50 rods (275 yards) of that court's jurisdictional boundaries, both places are in Massachusetts, and no other District Attorney has filed a notice requiring an inquest.

2:03 Judicial Assignment and Scheduling

The Chief Justice of the District Court will assign a judge to conduct the inquest hearing in the District Court with jurisdiction over the matter.

The judge should confer with the Clerk Magistrate, the First Justice, and Regional Administrative Justice about scheduling and other logistical issues that may arise.

COMMENTARY

If necessary, under G.L. c. 218, § 43A, the Chief Justice of the District Court can move the proceeding to any other court or location within the District Court department "in order to promote the speedy dispatch of the court's business." Such considerations may include availability of courtrooms, staffing, and parking. Upon such a move, the case remains a case of the court where it originated, for jurisdictional purposes.

An attorney from the District Court's administrative office may be assigned to assist the inquest judge.

See Appendix 3, Sample Letter and Order of Chief Justice of the District Court Assigning District Court Judge.

2:04 Judge's Review of Relevant Documents

Following assignment by the Chief Justice, the inquest judge should request, and the District Attorney shall provide, all relevant documents. These include the autopsy report, a list of witnesses, a brief summary of their expected testimony, and any other records of the investigation prepared by the medical examiner, by investigators for the District Attorney's office, or by a police department.

The judge should carefully review these documents to determine whether they appear to be complete, whether additional documents should be requested, and whether they set forth any act or negligence of another that is alleged to have caused the death. The documents must be impounded from public view.

COMMENTARY

It is appropriate for the assigned inquest judge to request all relevant documents from the District Attorney upon receiving notice that an inquest is required. The inquest judge should review those documents carefully in order to familiarize themselves with the case. Any sharing of documents electronically shall be maintained in a secure manner. At the conclusion of the inquest, any such documents shall be removed from all external servers.

Any documents pertaining to the inquest must be impounded by the inquest judge. See *Kennedy*, 356 Mass. at 377–378; Standard 4:03; and the Uniform Rules of Impoundment Procedure.

When the inquest judge allows access to impounded material, the judge should issue a protective order that prohibits copying or dissemination and requires the return of the material to the court. See Appendix 4, Sample Protective Orders.

See Appendix 5, Sample Letter to District Attorney.

2:05 Preliminary Meeting with District Attorney

The judge should meet with the District Attorney to discuss inquest procedures. The judge may include the target or their counsel at this preliminary meeting if a target has already been identified. Such a meeting should be held with the same privacy restrictions as are applicable to the inquest itself and can be held in camera, in the courtroom, or by videoconference. The meeting should be held on the record, but the recording should be impounded.

COMMENTARY

While an inquest is neither an accusatory nor an adversarial proceeding, it involves the determination of important legal issues that can affect the rights and interests of many individuals, including anyone who may be considered a target of the inquest as well as the family of the deceased. For this reason, substantive *ex parte* discussions should be avoided.

To ensure that the inquest hearings proceed efficiently, a preliminary discussion with the District Attorney may be necessary to address procedural issues. For example, the judge and District Attorney should identify areas for which the District Attorney will take the lead and others where the judge will direct the investigation. Among the procedures discussed may be whether the District Attorney or the court shall summons witnesses. In either case, the District Attorney should provide the judge with the identities and addresses of persons who have a right to attend the inquest. These discussions should be on the record, whether in the courtroom or in camera, to avoid even the appearance of inappropriate contact.

The record of any preliminary meeting should be impounded, consistent with the general impoundment requirement applicable to inquests. See Standard 4:03.

At the preliminary meeting, the inquest judge should address any outstanding material not yet provided and may hold additional meetings and set deadlines as necessary. See Commentary to Standard 2:01.

2:06 Notice to Any Target of the Investigation

Absent special circumstances, the judge should notify any person identified by the District Attorney as a target of the investigation that they may request to be present at the inquest hearing, may be represented by counsel, and may request leave of the judge to present and examine witnesses. G.L. c. 38, § 8. The judge has discretion to appoint counsel to a target.

COMMENTARY

If an attorney has been identified as representing the target, notice should go to that attorney. If no attorney has been identified, the judge should send notice to the target(s) after first conferring with the District Attorney. The notice should state that an inquest is to be held and should inform the target(s) of their rights under the statute. It should also indicate a date by which time the identified target should notify the Judge, personally or through counsel, whether they wish to be present. The name of anyone so notified should be noted on the record.

The clerk may communicate with the Committee for Public Counsel Services in order to facilitate the appointment of counsel when appropriate.

See Appendix 6, Sample Notice to Target.

2:07 Obtaining Lists of Witnesses

Before the judge schedules the inquest hearing, the District Attorney must provide a list of all witnesses and a proposal for the order in which the witnesses will be called. If a target seeks to have a witness called, the target must provide a list of potential witnesses to the judge.

COMMENTARY

The judge should know the names of the witnesses who will be called in advance. This approach has four benefits: it will (1) compel the District Attorney and counsel for a target (and perhaps others, e.g., counsel for the family of the deceased) to identify witnesses in advance, (2) allow the judge to review the number of witnesses and thus gauge the likely length and scope of the proceedings, (3) help the judge identify which witnesses may have relevant testimony to give, and (4) allow the judge to determine whether the judge has any conflicts related to any target, interested person, or witness that may require the judge's recusal.

2:08 Scheduling: Notice

The court should promptly schedule the inquest and send reasonable notice of the time and place of the inquest to the District Attorney, the target, and their counsel, if any, and the following other persons:

1) **Any parent, spouse, or other member of the deceased's immediate family, and the deceased's legal representative or guardian;**
2) **The Department of Telecommunications and Cable, if the death occurred upon a public conveyance regulated by that department; and**
3) **The Registry of Motor Vehicles in any case of death in which any motor vehicle was involved.**

COMMENTARY

See Standard 3:02. The specific notice requirements set forth in this Standard are contained in G.L. c. 38, § 8. The word "or" in the statute should be read to include both the deceased's family members and legal representative or guardian**.**

See Appendix 7, Sample Notice to "Interested Persons."

CONDUCT OF THE INQUEST HEARING

3:00 In General

How a judge conducts an inquest hearing lies within the judge's discretion, with two exceptions: (1) the judge must exclude the public and the news media from the hearing; and (2) witnesses have the right to be accompanied by counsel. The judge's discretion should be exercised in a manner consistent with orderly procedure and with the goal of the inquest, which is to investigate the circumstances of the death.

COMMENTARY

The only specific legal requirements of an inquest hearing are that (1) they be closed to the public and the news media, and (2) witnesses may be accompanied and advised by counsel. These requirements are examined in later Standards. In other respects, "inquests shall be conducted in the sound discretion of the inquest judge." *Kennedy,* 356 Mass. at 377.

The Standards emphasize that the judge should maintain control of the proceeding so as to achieve its purpose, namely, to determine through investigation the information necessary for the resulting report: the "means" of death, the name of the deceased, "all material circumstances attending the death, and the name, if known, of any person whose unlawful act or negligence appears to have contributed thereto." G.L. c. 38, § 10.

3:01 Commencing the Inquest Hearing

At the opening of the inquest hearing, the judge should make a record of the procedures to be followed. This may include addressing the purpose of the inquest; the roles of the judge, clerk, District Attorney, counsel for the witnesses, counsel for the target, and counsel for the decedent's next of kin; the names of those who will be allowed to attend the inquest; and the fact that evidence will be admitted based on its relevance, in the discretion of the judge. Unless otherwise directed by the judge, all evidence, including recordings and transcripts, shall be impounded.

COMMENTARY

Because of the judge's wide discretion concerning how to conduct the hearing, it is useful for the judge, at the outset of the hearing, to describe the purpose of and procedures governing the inquest, and to resolve any legal or practical objections to the procedures.

At each hearing date, the judge should state for the record the parties who are present in the courtroom. The judge should order that no recording of any kind is permitted, other than an official court recording. Notetaking is only permitted by attorneys. See Standard 3:10. Any other person may take notes only with permission of the judge.

See Appendix 4, Sample Protective Orders.

3:02 Who May Be Present at the Inquest Hearing

Any person who has been identified as a target of an investigation and their attorney may be present at the inquest hearing. Counsel shall file a notice of appearance with the clerk.

The parents or guardian and next of kin of the person whose death is the subject of the inquest are "interested persons" who may be present.

The District Attorney should be allowed to be present at the inquest hearing, but that is not a requirement. If necessary, the inquest hearing may proceed without the District Attorney.

COMMENTARY

Given the rationale for excluding the public and the news media from an inquest hearing - to promote the efficient conduct of the hearing, and to ensure the fairness of any subsequent criminal proceedings (see Standard 3:03) - a judge should permit a person to attend the hearing, who does not have the right to do so, only when the judge finds that the person's interest in attending is substantial. For example, a person with an indirect connection to the deceased or the target of the investigation ordinarily would not appear to have a substantial interest in attending the hearing. The judge may, in their discretion, hear from anyone who wishes to attend why they should be permitted to do so.

The statute identifies "the parents, guardian or next of kin" as interested persons who may attend the inquest hearing. G.L. c. 38, § 8. The word "or" may be read as "and," to construe the statute to allow all such persons to attend the hearing.

When an inquest hearing will extend beyond one day, the court should provide a court officer with a list of those whose attendance is permitted on each day, to ensure that unauthorized persons are not admitted.

The District Attorney (or any person designated by the District Attorney) should be allowed to attend and to provide assistance to the judge. In the unlikely event that the District Attorney or a representative chooses not to attend, the hearing may nonetheless proceed.

3:03 Who Must and Who May be Excluded from the Inquest Hearing

The judge must exclude the public and the news media from the hearing. The judge must exclude any witness except when their presence is necessary for their testimony. The judge may also exclude any person from all or part of the proceedings.

COMMENTARY

The public and the news media must be excluded from inquest hearings. See *Kennedy*, 356 Mass. at 377. The ruling in *Kennedy* went beyond the statute, which indicated that the judge may close the hearing to persons who do not "have an interest" and who are not required by law to attend. The outright bar to the public and the news media announced in *Kennedy* was based on the need to ensure "a fair trial in any criminal proceedings which may follow the inquest." *Id.* at 376. The court observed that "[a] public inquest also may tend to limit or delay the inquest investigation." *Id.*

3:04 Summonsing Witnesses

In advance of the hearing, the judge should determine the witnesses to be called. Witnesses may be summonsed in the same manner as in a civil action, subject to modification by the judge, if required, or the judge may direct the District Attorney to summons witnesses.

During the hearing, the judge may summons additional persons or records that the judge determines may assist in the investigation.

COMMENTARY

Standard 2:07 discusses the need for the judge to obtain lists of proposed witnesses in advance of the hearing. Summonses should be issued to all witnesses from whom the judge wishes to hear, to avoid delaying the proceedings. Typically, the judge requests the District Attorney to summons witnesses.

The medical examiner and other physicians can testify as medical experts concerning observations made at an autopsy, even if the autopsy was not conducted in compliance with G.L. c. 38, § 6. See *Commonwealth v. Noxon,* 319 Mass. 495, 543 (1946).

3:05 Sequestration of Witnesses

Witnesses who are not "interested persons" must be excluded from the inquest hearing except when necessary for their testimony. See Standard 3:03. Presumptively, witnesses should be sequestered while at the court.

The judge should also admonish and may, in certain circumstances, order witnesses and "interested persons" who attend the hearing not to discuss the inquest until the report is made public. Such an order must be based on a need particular to the investigation.

COMMENTARY

The law expressly states that the witnesses may be sequestered. G.L. c. 38, § 8. However, the judge should consider whether it is necessary for an expert witness to attend when not testifying.

The value of sequestration is diminished if the witnesses are not precluded from discussing the case during the times when they are not kept separate at the court. This is particularly important in those proceedings that require more than one day.

While allowing "interested persons" to attend the hearing has obvious benefits, permitting them to publish the testimony they have heard could, in some cases, interfere with the progress of the investigation. In such cases, the judge should consider whether to issue a "gag order" directing "interested persons" not to disclose testimony they have heard or excusing them from portions of the hearing. While the constitutionality of such a gag order presents an open question, the Standards take the position that the First Amendment restriction on such orders may not apply because an inquest is not a criminal proceeding and the public and media do not have a right of access to it.

"[An] order seeking to enjoin speech must be based on detailed findings of fact that (a) identify a compelling interest that the restraint will serve and (b) demonstrate that no reasonable, less restrictive alternative to the order is available." *Commonwealth v. Barnes*, 461 Mass. 644, 652 (2012) (internal citations omitted). In deciding whether to issue such an order, the judge should make findings whether publication of testimony taken during the inquest would likely have a negative impact on the investigation or harm a potential target or witness. The order should be narrow in its scope and restricted in its duration.

3:06 Fifth Amendment Rights of Witnesses

When necessary or appropriate, the judge should explain to a witness their privilege against self-incrimination as provided by the Massachusetts Declaration of Rights and the United States Constitution. Where a witness is represented by counsel, the judge may inquire if counsel is satisfied that the witness understands this privilege and should allow counsel to confer with the witness during testimony when issues impacting the privilege arise.

COMMENTARY

Given the purpose of the inquest, it is not uncommon for the Fifth Amendment privilege against self-incrimination to be implicated, especially when a person who may be a target of the investigation testifies. But it is not required that the judge give a witness *Miranda* warnings because neither the terms of the *Miranda* decision nor its rationale extend to an official investigation conducted through a judicial inquest. *Labbe v. Berman*, 621 F.2d 26, 29 (1st Cir. 1980).

> The judge "should carefully explain to witnesses, if it appears necessary or appropriate to do so, their privilege not to incriminate themselves." *Kennedy*, 356 Mass. at 375. Where a witness is represented by counsel, the judge can rely on counsel in this regard. When a witness is not represented, the judge should inform the witness of their right to engage counsel.

The judge may exercise discretion to appoint counsel to the witness to determine whether the witness will exercise the privilege. See e.g., *Commonwealth v. Pixley*, 77 Mass. App. Ct. 624, 626 (2010) (judge appointed counsel to witness to consult about witness's potential Fifth Amendment privilege).

For an unrepresented witness, the explanation of the Fifth Amendment privilege should occur at the beginning of the testimony, or at any point where self-incrimination might appear imminent. The explanation should include that the witness is under no obligation to give any information that could be used as evidence against them in any prosecution.

3:07 Assistance of Counsel for Witnesses

Every witness must be allowed to have counsel accompany them and advise them during their testimony. When a witness is not testifying, their counsel may not attend the inquest, with one exception. If a witness is an "interested person," the judge, in their discretion, may permit counsel for the "interested person" to attend the inquest when the client is not testifying.

Any attorney representing a witness must file an appearance of counsel with the court.

COMMENTARY

All witnesses at inquest hearings "may be accompanied and advised by counsel while in attendance or testifying at an inquest." *Kennedy*, 356 Mass. at 377. As reflected in the Standard, witnesses who are not entitled to attend during the hearing except when they are testifying have a right to have counsel attend only while they are testifying. See Standard 3:02 regarding who may attend.

It should be noted, that "[t]here is, of course, some practical limit to the number of counsel who helpfully can participate in the same hearing at the same time." *Kennedy,* 356 Mass. at 375. This implies that the judge should exercise control, as necessary, to ensure that involvement of counsel remains orderly.

3:08 Presentation of Evidence, Examination, and Cross-Examination by Witnesses or Their Counsel

In general, evidence at an inquest should be admitted based on its relevance, as determined by the judge, and given such weight as the judge deems appropriate. No witness or interested person has the right to present evidence, call and examine witnesses, or cross-examine other witnesses directly or through counsel. The judge may, in their discretion, permit such presentation of evidence, and examination or cross-examination by witnesses, interested persons, or their counsel whenever the judge determines that doing so will assist the court in its investigatory function, serve to diminish the possibility of injustice, or avoid injury to reputation.

Offers of proof may be required for the judge to determine whether to allow cross-examination or presentation of evidence, or as a method to afford witnesses the opportunity to amplify or correct their own testimony or that of others.

The District Attorney should normally be allowed to examine witnesses. See Standard 1:03 and related commentary.

The judge may request or allow the District Attorney or any interested party to provide a summary of the evidence at the conclusion of the hearing.

COMMENTARY

The rules of evidence do not apply to inquest hearings. The Standard takes the position that a judge should admit all relevant evidence and give it appropriate weight. Thus, evidence that would be excluded as hearsay at a trial should be admitted at an inquest if relevant and potentially helpful to the judge. Questions about the reliability of evidence generally will affect the weight accorded to the evidence.

Regarding the presentation of testimony at an inquest, two basic principles apply: (1) the hearing is not adversarial but investigatory, and the judge conducts the investigation, and (2) the manner in which testimony proceeds is largely a matter left to the judge's discretion.

Accordingly, the judge must decide which witnesses will testify, who will conduct direct examination, and who, if anyone, will be permitted to engage in cross-examination.

The inquest judge "may permit cross-examination or the presentation of evidence by possible interested persons when it might be helpful . . . or might serve to diminish the possibility of injustice or to avoid injury to reputation." *Kennedy*, 356 Mass. at 375. This Standard takes the position that the District Attorney should normally be permitted to examine and cross-examine witnesses, but the judge may choose to question the witnesses.

The provision in the Standard regarding offers of proof is taken directly from *Kennedy.* See *id*.

3:09 Assistance of Counsel for Targets and Interested Persons

When counsel for a target or, if the judge allows, counsel for an interested person attends the hearing, the judge should establish clear rules concerning the degree of participation permitted. The participation of such counsel shall be a matter for the judge's discretion. The judge should exercise care to control the proceedings.

COMMENTARY

The only counsel the judge must allow to be present throughout the proceeding is counsel for a target. The judge may in their discretion also allow counsel for "interested persons" to be present. The judge may permit an attorney for "interested persons" or the target to present evidence, and to examine or cross-examine witnesses. The judge should limit participation to advancing the aim of the inquest rather than exploring extraneous issues, such as potential civil liability of a witness or target of the inquest.

3:10 Recording the Proceedings

All inquests must be electronically recorded by court-controlled audio equipment, in accordance with court rules. The judge should not allow any person attending the inquest to electronically record the proceedings. The judge, in their discretion, may allow attorneys to take notes.

COMMENTARY

Electronic recording of inquest proceedings with court-controlled equipment is required under the terms of Rule 211 of the Special Rules of the District Court. The clerk must ensure all recordings are impounded in the recording system and not publicly available. A transcript from the recording should be obtained from one of the transcribers approved for that purpose by the Office of Transcription Services. See Standard 4:02.

Since inquest proceedings are closed to the public and the media, the judge should not allow recording by anyone attending, because of the likelihood that the proceedings would thereby become publicly accessible.

See Standard 3:01 and 4:03 requiring impoundment of evidence, recordings and transcripts.

3:11 Taking a View

The judge may decide, in their discretion, to take a view of land, premises, or any object relevant to the inquest. Such a view may be taken at any time during the inquest.

The purpose of such a view is to assist the judge in understanding the evidence presented. All those permitted to attend an inquest should be allowed to attend the view. Any orders regarding sequestration would remain in effect during the view. During the view, any person permitted to attend, or their counsel, may be allowed to point out matters of potential interest to the judge, subject to judicial discretion and control.

COMMENTARY

There is no express authority for a judge to conduct a view during an inquest, as there is for criminal cases. However, such authority should be implied as a means, where appropriate, of fulfilling the judge's investigatory responsibility.

Although views are often conducted before evidence is taken, the judge may decide to take a view at any time. Before taking a view, the judge should announce for the record the place and any objects that will be viewed, and that information acquired on the view may be used and considered by the judge.

The view should be coordinated by the District Attorney with the assistance of court officers and local police departments, if necessary, to assist with any traffic or other safety concerns. The view should be recorded by portable electronic audio recording equipment or by another reliable method, under the court's direction and control.

THE INQUEST REPORT

4:00 Contents of the Report

4:01 The Issue of "Negligence" in the Inquest Hearing and Inquest Report

4:02 Filing of the Report and Transcript

4:03 Impoundment of the Inquest Documents at the District Court; Limited Access

4:04 Termination of Impoundment; Public Access to Inquest Documents

4:05 Return of Inquest Exhibits

4:00 Contents of the Report

At the conclusion of an inquest, the judge must prepare a written report that provides the following information:

1) **When, where, and by what means the deceased met their death;**
2) **The name of the deceased, if known;**
3) **All material circumstances attending the death; and**
4) **The name, if known, of any person whose unlawful act or negligence appears to have contributed thereto.**

The judge's conclusions on these facts should be based on the preponderance of the credible evidence.

The report should explain the evidentiary basis for each of the judge's conclusions—or the lack of evidence, as the case may be—including the credibility of the witnesses.

The judge should not make recommendations as to possible prosecution.

COMMENTARY

The contents of the inquest report, as set forth in this Standard, are expressly required by G.L. c. 38, § 10**.** The report represents the judge's conclusions concerning, for example, "when, where, and by what means the person met his death," based on the evidence presented at the hearing.

Consistent with the nature and purpose of the inquest, the judge determines the facts based on the preponderance of the credible evidence. Based on those findings, the judge may determine whether there is probable cause to believe that the target committed a crime that contributed to the death in question.

The Standard takes the view that the report should not go beyond the statutorily mandated requirements. Because the procedure is investigatory and not accusatory (see Standard 1:01), the report should not include any recommendation concerning prosecution. The decision whether to prosecute or not will be that of the District Attorney following the filing of the inquest report. See Standards 5:00 and 5:01. The

law does not allow the inquest judge to recommend whether someone should be prosecuted and making such a recommendation would be fundamentally inconsistent with the non-accusatory nature of the inquest.

4:01 The Issue of "Negligence" in the Inquest Hearing and Inquest Report

The inquest hearing and inquest report should not address the issue of civil negligence. "Negligence," as referred to in G.L. c. 38, § 10, should be interpreted to refer to "criminal negligence." Criminal negligence involves wanton or reckless conduct. Ordinary negligence should be addressed only when it is an express element of a crime relevant to the inquest.

COMMENTARY

General Law c. 38, § 10, states, in pertinent part (emphasis added):

> "The court shall report in writing . . . the name, if known, of any person whose *unlawful act or negligence* appears to have contributed [to the death of the deceased]."

This reference to "negligence" is ambiguous. However, because the purpose of an inquest is to determine whether a *crime* may have been committed, neither the hearing nor the report should be concerned with civil negligence. See *Kennedy*, 356 Mass. at 371; Standard 1:01. Rather, the hearing and report should be concerned with negligence only in the criminal context. Thus, crimes that include among their elements wanton or reckless conduct (including those involving the failure to act), involve "negligence" within the meaning of G.L. c. 38, § 10. See *Commonwealth v. Welansky,* 316 Mass. 383, 400 (1944). The civil definition of negligence, i.e., "ordinary negligence," should come into play in an inquest only when "negligence," rather than wanton or reckless conduct, is an express element of a crime. For example, motor vehicle homicide resulting from negligence, G.L. c. 90, § 24G(a), involves ordinary negligence as an element.

Although one or more participants in an inquest may have an interest in a determination of civil negligence, even if no criminal proceeding results, it is not the purpose of the inquest to resolve or facilitate the resolution of such civil issues.

4:02 Filing of the Report and Transcript

The judge must file the inquest report and a transcript of the inquest proceedings with the Superior Court for the county in which the inquest was held. These documents should be delivered to the clerk of the Superior Court.

A copy of the report and transcript should be kept at the District Court, with the inquest exhibits. The judge shall direct the District Court clerk to promptly notify the District Attorney that the report and transcript have been filed in the Superior Court and the date of this filing. The judge may provide the District Attorney with a copy of the report.

If the judge determines that the inquest relates to an accidental death upon a public conveyance regulated by the Department of Telecommunications and Cable, the judge shall direct that a copy of the transcript of the inquest and inquest report be delivered to the Department of Telecommunications and Cable. See G.L. c. 38, § 9 for additional reporting requirements in these circumstances.

COMMENTARY

Pursuant to G.L. c. 38, § 10, and *Kennedy,* 356 Mass. at 377, the inquest judge is required to file the inquest report and transcript with the Superior Court. These documents should be filed with the Superior Court clerk. *Id.* The District Court clerk should make the actual transmittal and should document that transmittal in the District Court docket. Copies of the report and transcript should be kept in the District Court file, with the exhibits. The inquest judge may also keep a copy of the report.

The inquest judge may, in their discretion, provide a copy of the report to the District Attorney. The inquest judge is not obligated to provide a copy to the target until the report and transcript are unimpounded by the Superior Court.

The judge should ensure that the transcript of the proceedings be prepared and filed in a timely fashion. The judge should direct the clerk or counsel from the Administrative Office of the District Court to contact the administrative staff of the court's

recording system to obtain all impounded recordings related to the inquest. The clerk or counsel should then contact the staff of the Office of Transcription Services and provide them with those recordings to facilitate prompt completion of a transcript of the hearings.

Although G.L. c. 38, § 9 mandates that the judge provide a transcript to the "Department of Telecommunications and Energy," the department name has been changed to the "Department of Telecommunications and Cable," as reflected in the Standard. The statute requires the transcript to be provided within thirty days of closing the inquest hearings.

See Appendix 8, Sample Letter to District Court Clerk; Sample Letter to Superior Court Clerk.

4:03 <u>Impoundment of the Inquest Documents at the District Court; Limited Access</u>

All materials relating to the inquest, including the copy of the report, copy of the transcript, the exhibits, and the recording must be impounded at the District Court.

During the period of impoundment, only the following shall have access to certain inquest documents:

1) The District Attorney involved in the inquest, the Attorney General, and counsel for any person who has been stated in the report as having actual or possible responsibility for the decedent's death shall have access to the report and transcript.

2) An inquest witness shall be permitted, directly or through counsel, to check the accuracy of the transcript of their own testimony and to file with the inquest judge and the Superior Court clerk any suggested corrections.

The District Court inquest judge will decide whether access to these materials is limited to viewing the items or whether the requestor will be permitted to have a copy of the materials and for what period of time. In no event may any person who has been given access distribute these materials or their contents in any manner without express permission of the inquest judge.

Requests for access to the report and transcript that are made after they have been transmitted to the Superior Court should be referred to that court. See Standard 4:04. Requests for access to the exhibits should be made to the District

Court unless the Superior Court has ordered their transfer, in which case such requests for access should be addressed to the Superior Court.

COMMENTARY

The inquest report and transcript are required by statute and case law to be impounded. See G.L. c. 38, § 10; *Globe Newspaper Co.*, *petitioner*, 461 Mass. 113, 121–122 (2011) (interpreting § 10 to require impoundment of both report and transcript, even though § 10 speaks only of impounding the transcript); *Kennedy,* 356 Mass.at 377. Consistent with the rationale of these authorities to keep inquest materials confidential, the Standard takes the position that inquest exhibits as well as the recording of the inquest hearing shall also be impounded. See Standard 4:04. Note that persons who attended the inquest as "interested persons" but who did not testify as witnesses are not entitled to access the inquest material. See Appendix 4, Sample Protective Orders.

Once the District Court has completed the inquest, and the report and transcript have been officially transmitted to the Superior Court, requests for access to those documents should be decided upon by the Superior Court, since it is the court having custody of the documents. Any requests for access to inquest exhibits should be addressed to the inquest judge in the District Court.

The case law is silent concerning the procedure to be followed if a witness files a "suggested" correction of the transcript of their testimony, in both the District Court and Superior Court. *Kennedy*, 356 Mass. at 378. One option would be for the inquest judge to review the matter and listen to the recording of the hearing, order any appropriate changes be made to the transcript, and file the order with the Superior Court, which could append the transcript-correction order to the transcript.

It should be noted that, after indictment and arraignment in capital cases, the District Attorney shall provide certain inquest documents to the accused. G.L. c. 38, § 7, last par.

The above-described restrictions on publicizing inquest materials do not limit the use of the inquest transcript by the parties in a subsequent criminal case. *Commonwealth v. Dabrieo,* 370 Mass. 728, 741-742 (1976).

General Laws c. 218, § 27A(d) prohibits the judge who held the inquest from acting in a subsequent criminal case. The criminal case may be tried to a jury before a judge who has read the inquest report, as long as there is no evidence that the judge improperly relied on the inquest report in ruling on issues arising before or at the trial. *Commonwealth v. Valliere*, 366 Mass. 479, 483 (1974). It is advisable for the judge presiding over the criminal case not to read the report, so that the issue of disqualification does not arise.

4:04 Termination of Impoundment; Public Access to Inquest Documents

The inquest report, transcript and any other material relating to the inquest must be impounded until the District Attorney files in the Superior Court for the county where the inquest was held either:

1) **a certificate that the District Attorney will not present a case to a grand jury, or**
2) **a notice that the grand jury has returned a true bill, or**
3) **a notice of no bill after presentment of a case relating to the inquest to a grand jury.**

The clerk of the Superior Court shall send a copy of this certificate or notice to the clerk of the District Court where the inquest was held. Following the filing of the certificate or notice, or if a judge of the Superior Court determines that no criminal trial is likely, the Superior Court may order release of the report and transcript. If the Superior Court ordered transfer of the inquest exhibits, any requests for access must be addressed to the Superior Court. However, there is to be a ten-day waiting period between any order of release and actual release to allow time to hear objections to the order. Impoundment past this time is subject to Trial Court Rule VIII and applicable constitutional requirements governing public access to court records.

When the District Attorney files the certificate or notice referred to above, the Superior Court shall promptly hold a hearing, with notice to the District Attorney, any target of the inquest, and the decedent's immediate family. At the hearing, the Superior Court shall notify those attending that the court will

unimpound the inquest report and transcript after the expiration of the ten-day period unless, on motion, the Superior Court judge finds good cause to continue the impoundment of some or all of the inquest report and transcript.

If a motion to continue the impoundment is filed, the inquest report and transcript shall remain impounded until the Superior Court adjudicates the motion or otherwise orders. If a motion to impound or redact is denied or not filed, the inquest report and transcript filed with the Superior Court shall be unimpounded on expiration of the ten-day period. The Superior Court shall notify the clerk of the District Court of any orders continuing or lifting the impoundment.

Upon unimpoundment in the Superior Court, any other inquest materials in the possession of the District Court, including inquest exhibits, transcripts, and electronic recordings of the proceedings, may be opened to public access in the discretion of the inquest judge, or a judge of the District Court where the inquest was held if the inquest judge is not reasonably available. Such discretion should be governed by the procedures governing impoundment, Trial Court Rule VIII, and by applicable constitutional requirements governing public access to court records.

COMMENTARY

Public access to the inquest report and transcript is a matter of Superior Court determination. By statute, the transcript is required to be impounded until the District Attorney files the above-mentioned certificate or notice in the Superior Court. G.L. c. 38, § 10. Logic requires that the inquest report also be impounded until the certificate or notice is filed. The judge may impound any documents or evidence pursuant to the Uniform Rules on Impoundment Procedure Rule X, despite one of the above triggering

events. See *Globe Newspaper Co.*, 461 Mass. at 121-122.

While the statutes do not address impoundment or release of documents, the Supreme Judicial Court held in *Kennedy* that if the District Attorney files a certificate that no prosecution is proposed, or if a Superior Court judge determines that no criminal trial is likely, there is a no bill, or if a trial of the persons named in the report is completed, then, upon order of the Superior Court, "the report and transcript shall be open forthwith to public examination." *Id.* at 378. It is not clear whether the required Superior Court order merely represents a determination that one of the required events has occurred, or whether, despite its occurrence, the Superior Court could issue a further impoundment order. The decision and the statute do not completely mesh. For example, the statutory impoundment period ends when the grand jury has returned a true bill, but the *Kennedy* case contemplated that the documents would remain impounded "until the events have been considered by the fact finder in any criminal proceeding." In any event, these are issues to be determined by the Superior Court.

In *Globe Newspaper Co.*, the Supreme Judicial Court ruled that both the inquest report and transcript are subject to impoundment until they become public under G.L. c. 38, § 10. 461 Mass. at 123-124. The SJC also exercised its "superintendence authority to require the extended impoundment of the inquest transcript and report for a period of ten calendar days after the filing of the required notice or certificate by a district attorney under § 10. At the conclusion of this ten-day period, the report or transcript shall be available for public inspection in the absence of an impoundment order or a judicial order pending adjudication of a motion to impound." *Id.* Because the District Attorney is not required to give advance notice of the filing of the certificate or notice to either the target or other interested persons, continuing impoundment during the ten-day period after filing of notice or certificate gives the interested parties an opportunity to obtain inquest documents or seek further impoundment prior to the media or other parties procuring the documents. *Id.* at 123.

Regarding inquest documents other than the report and transcript that are in the possession of the District Court, the Standard takes the position that those documents should not be made public before a Superior Court order making public the report and inquest, and that after such an order, public access is an issue for the District Court to decide, in accordance with the impoundment rules and applicable law. If a Superior Court judge has ordered transfer of these documents to the Superior Court, requests for access will be decided by the Superior Court. See Standard 4:05.

An order allowing or denying a motion to continue the impoundment past the ten-day period, or for redaction, may be appealed to a single justice of the Appeals Court. See Uniform Rules of Impoundment Procedure, Rule 12(a).

4:05 Return of Inquest Exhibits

Ninety days after the filing of the report and transcript in the Superior Court, all exhibits received in evidence during the hearing should be returned by the clerk of the District Court to the parties who introduced them, unless a Superior Court judge has issued an order to transfer the exhibits. Upon an order of the Superior Court, the District Court clerk shall transfer the exhibits to the Superior Court.

The District Court shall retain in its file a copy of the exhibit list, as well as a copy of the report, transcript, and witness list in accordance with the Trial Court's Record Retention Schedule.

COMMENTARY

While the clerk's office generally is responsible for retaining certain exhibits after a criminal trial, this responsibility does not apply at the inquest stage. See *Dist. Attorney for Northern Dist. v. Superior Court*, 482 Mass. 336, 341 (2019) (discussing the "hodgepodge" of statutes and rules that govern the retention of exhibits). This Standard has adopted the above guideline to alleviate the burden on the District Court clerk of continued or indefinite retention of inquest documents, while mindful of the need for production of discovery in a criminal prosecution should a prosecution be initiated and the privacy interests of the parties where no prosecution is sought. The Trial Court's Retention Policy does not currently cover inquest materials. Where the inquest is not a criminal prosecution in the District Court, it may not be necessary to retain the report, transcript, witness list, and exhibit list for the same length of time as for other criminal matters.

CRIMINAL PROCEEDINGS

5:00 In General

5:01 No Standing for Private Individuals

5:02 Application for Criminal Complaint Following an Inquest

5:00 In General

Once the inquest report and transcript have been filed, the decision whether to initiate prosecution is left to the District Attorney.

COMMENTARY

The inquest is not a criminal proceeding and is not part of any criminal proceeding that may ensue. *Kennedy*, 356 Mass. at 374. Because the inquest is an investigatory rather than an accusatory proceeding, "in order to initiate a criminal prosecution, there must be subsequent and independent criminal proceedings." *Id.*

It appears that the overall statutory scheme is for the inquest report to be followed, where appropriate, by an independent decision by the District Attorney to seek commencement of a criminal case. This is usually accomplished by seeking an indictment from a grand jury but may also be done by criminal complaint.

5:01 No Standing for Private Individuals

A private individual does not have standing to compel the District Attorney to bring criminal proceedings against an individual named in an inquest report.

COMMENTARY

The Supreme Judicial Court has held that "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." *Manning* v. *Municipal Court*, 372 Mass. 315, 317-318 (1977). Therefore, a private citizen does not have a private legal interest in having the District Attorney or Attorney General bring criminal proceedings against an individual named in an inquest report. *Shepard* v. *Attorney General*, 409 Mass. 398, 400 (1991).

It should be noted that, "[a]ny individual is entitled to file an application for a criminal complaint and to have a magistrate act on it." Standards of Judicial Practice, The Complaint Procedure, Standard 3:00. However, the private individual has "no right to have a criminal complaint authorized." See *id* at Standard 3:09.

5:02 Application for Criminal Complaint Following an Inquest

The District Attorney may file an application for a criminal complaint following an inquest. Such application should be processed in the usual course. At the complaint hearing, the District Attorney may provide a copy of the inquest report to the magistrate for such evidentiary purposes as the magistrate deems appropriate.

COMMENTARY

Following an inquest, the District Attorney has the option of either seeking a grand jury indictment or filing an application for a criminal complaint for the crime or crimes, if any, which are the subject of the report. The inquest is not part of a criminal proceeding, but the inquest report may be offered to the clerk magistrate in support of an application for a criminal complaint.