

PROPOSED NEW
MASSACHUSETTS SUPERIOR COURT
RULE 17A- OFFICIAL RECORD OF SUPERIOR COURT PROCEEDINGS

Propose to **delete** existing Superior Court Standing Order 2-87- Electronic Recordation of Proceedings and **adopt** new Superior Court Rule 17A- Official Record of Superior Court Proceedings.

PROPOSED NEW RULE

SUPERIOR COURT RULE 17A.
OFFICIAL RECORD OF SUPERIOR COURT PROCEEDINGS.

1. Definitions
 - a. The term "Court Reporter" means an official court reporter assigned to the session, any per diem court reporter approved by the Superior Court or a temporary official reporter appointed by the session judge pursuant to G.L. c. 221, § 83.
 - b. The term "Approved Court Transcriber" means a person on the "Trial Court Approved Transcriber List" managed by the Office of Transcription Services.
 - c. The term "Office of Transcription Services" or "OTS" means the Office of Transcription Services of the Trial Court Department or any successor unit responsible for transcription of Superior Court proceedings.
 - d. For purposes of Mass. R. App. P. 8(b)(3)(ii), a copy of the recording made by the session clerk, whether on compact disk or other physical or electronic medium, shall constitute the "cassette."
2. Court Reporters
 - a. When a Court Reporter records the proceeding, the sole official transcript in the Superior Court is a transcript produced by the Court Reporter.
 - b. In the absence of an assigned Court Reporter, the session judge may appoint of a temporary court reporter pursuant to G.L. 221, § 83.
 - c. Unless otherwise expressly ordered by the court, the presence of a certified court reporter actively recording the proceedings without objection by the parties shall be deemed an appointment of that reporter as a temporary official court reporter pursuant to G.L. c. 221, §83.

3. Audio or Visual Recordings

In the absence of a Court Reporter, the proceedings shall be recorded by audio or audiovisual means on a recording device or system approved by the Chief Justice of the Trial Court or designee. In that event, the following rules apply:

- a. The Session Clerk or other designee of the Clerk Magistrate will operate the recording equipment. The Clerk Magistrate or designee shall have the care, custody and control of all recordings.
- b. The Clerk Magistrate or designee shall ensure that a daily copy (CD or DVD) of the audio of each session digitally recorded is made and retained.
- c. The sole official transcript in the Superior Court is a transcript produced and certified by an Approved Court Transcriber prepared from those recordings unless otherwise ordered by the Court, except as provided in Mass. R. App. P. 8(b)(3).
- d. Counsel and self-represented persons shall assist in creating an audible record by using the microphones provided and shall be responsible for requesting the Session Justice, when necessary, to instruct other counsel, witnesses or others as to the proper use of the microphones in order to insure an audible record. Counsel, self-represented persons, clients, witnesses and all other attendees shall also be responsible to mute microphones when necessary to protect against recording of communications protected by the attorney-client or other privilege.

4. Release of Recordings

- a. Audio or audiovisual recordings made by the clerk are presumptively available to the parties and the public unless impounded or otherwise deemed non-public by statute, rule or binding appellate precedent. Upon receiving a request for a recording, the clerk shall review the docket entries, the file and the recording to avoid release of any such non-public information and to ensure compliance with any order sealing, impounding, or otherwise precluding or limiting access to all or any portion of the recording. Unless otherwise ordered by the court, all publicly available recordings shall be released (i) by consent of all parties, (ii) after 10 days notice as verified in writing by the requestor, or (iii) pursuant to Mass. R. App. P. 8(b)(3)(ii) and part 5 below. The court may also approve earlier release of the recording upon a sworn showing of an emergency and such notice as time permits.
- b. If any party has reason to believe that the recording may contain (i) inadvertently recorded confidential communications, (ii) other information protected by law from disclosure or (iii) material that should be released only in transcript form, that party shall file an opposition directly with the court, stating the basis of the objection and attaching all evidentiary and legal support. In the event of opposition, the clerk will not release the recording without an order of the judge who presided over the recorded proceeding, or in

his or her absence, the session judge. The court has the discretion to rule on the objection on the papers or after hearing.

c. All parties or attorneys objecting to release of a recording on the ground that their privileged or confidential communications may have been recorded shall presumptively bear the burden and expense of redacting such communications from any recording provided under this Rule, unless otherwise ordered by the court.

d. A person or entity moving to make public any official or unofficial recording that is not presumptively available to the public has the burden to show why doing so would serve the interests of justice in the particular case or is required by law. Among other things, the Court shall consider and, if appropriate, protect against: (1) the possible presence of audible confidential communications or impounded information on the recordings; (2) the possibility of public confusion due to multiple versions of the "record" of a proceeding; (3) potential modification of the recordings or preparation of transcripts from recordings by untrained persons who are not under a professional or legal obligation to prepare the record without misrepresentation, bias or omissions; and (4) the possible use or misuse outside the courtroom in a manner that could materially embarrass, humiliate, intimidate or invade the privacy or peace of mind of individuals. The Court may require the moving party to reimburse the Commonwealth for any employee time or expense required to review the recording for potentially confidential, embarrassing, intimidating or humiliating material.

5. Release of Recordings for Transcription on Appeal

a. Unless opting to proceed pursuant to paragraph B of this paragraph, an appellant orders the recording "from the clerk" of this court for purposes of Mass. R. App. P. 8(b)(3)(i), by submitting a request to OTS on the applicable OTS form simultaneously with the filing of the notice of appeal. That method fully suffices to order the recording as long as the appellant discloses that request in a timely-filed transcript order form pursuant to Mass. R. App. P. 8(b).

b. Any appellant who chooses to submit a request directly to the clerk for copies of recordings under Mass. R. App. P. 8(b)(3)(i) shall state whether the appellant intends to ask the appellee to agree upon an individual or firm to prepare the transcript pursuant to Mass. R. App. P. 8(b)(3)(ii). In the absence of such a statement and subsequent timely-filed document designating the agreed transcriber, the Clerk shall designate OTS as the transcriber, except as may be provided in procedures promulgated by the Chief Administrative Justice pursuant to Mass. R. App. P. 8(b)(3)(ii), fourth sentence.,

c. If, for any reason, OTS does not provide for the transcription, any party submitting an order for the recording under Mass. R. App. P. 8(b)(3)(ii) shall simultaneously (or in advance) comply with paragraph 4 above, but shall not delay compliance with Mass. R. App. P. 8(b)(3)(ii).

6. Retention of Recordings

Recordings shall be preserved in criminal matters in perpetuity and in civil matters for six years after entry of final judgment (which, in the event of an appeal, shall be the final judgment after rescript).

7. Motions for Enforcement or Relief

Motions for enforcement of, or relief from, the above provisions, or for correction or supplementation of the transcript of a trial or motion hearing, shall be made to the trial or motion judge who presided over the session, if possible. Otherwise, such motions shall be made to the then-sitting session judge.