REPORT of the
TRIAL COURT WORKING GROUP
on COMPLAINT STANDARDS

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Members:
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Report of the Complaint Standards Working Group

I. Introduction

In October of 2018, the Chief Justice of the Trial Court, Hon. Paula M. Carey, established a Trial Court Working Group to examine the processes related to the initiation of criminal proceedings of a person who has not been arrested pursuant to G.L. c. 218, § 35A, sometimes referred to as "show cause hearings." Specifically, Chief Justice Carey asked that the Working Group review the District Court Standards on Judicial Practice: The Complaint Procedure ("Standards") and make recommendations on the following issues:

1. Whether amendments should be made to the procedures and Standards governing show cause hearings;

2. Whether the Boston Municipal Court and District Court should adopt joint Standards;

3. Whether provisions in the Standards related to hearings on felony offenses should be amended;

4. Whether the Standards should be amended to clarify the rights of an applicant for a criminal complainant if dissatisfied with the decision made by the Clerk-Magistrate;

5. Whether the Standards related to public access to show cause hearings should be amended, specifically, whether the current Standards should provide additional guidance on the factors to consider on the issue of whether to open a show cause hearing to the public;

6. Whether a policy requiring the recording of show cause hearings should be implemented;

7. How data regarding the rates of allowances and denials of criminal complaints in each of our courthouses can be collected in order to learn of, and address, disparities, if any; and

8. What training should be provided to Clerk-Magistrates and Assistant Clerk-Magistrates?

Chief Justice Carey appointed Hon. Paul F. LoConto of the District Court and Hon. Kenneth J. Fiandaca of the Boston Municipal Court to co-chair the Working Group and appointed as members: District Court Chief Justice Paul C. Dawley; Boston Municipal Court Chief Justice Roberto Ronquillo; Hon. Benjamin C. Barnes, First Justice of the Malden District Court; Margaret Albertson, Clerk-Magistrate of the South Boston Division of the Boston Municipal Court; Daniel Hogan, Clerk-Magistrate of the Boston Municipal Court; Michelle Kelley, Clerk-Magistrate of the Wrentham District Court; and Philip McCue, Deputy Court Administrator of the District Court and Director of Court Operations, and former Acting Clerk-

Magistrate and First Assistant Clerk. The Working Group is staffed by Zachary Hillman, General Counsel of the District Court, Bethany Stevens, Director of Legal Policy for the District Court, and Alexandra Capachietti, Deputy Legal Counsel of the Boston Municipal Court.

The Committee reviewed the Standards, primarily focusing on the standards governing show cause hearings, held several in person meetings and invited representatives from the defense bar and bar associations to address the Working Group on the issues with which the Group has been charged, resulting in the following report.

II. Show Cause Hearings and Background/History of the Standards

Initially enacted in 1943, Section 35A authorizes a private party to apply for a criminal complaint, and entitles a person who has been accused of a misdemeanor offense in the District Court, Boston Municipal Court, Juvenile Court, or Housing Court, but has not been arrested, to "an opportunity to be heard personally or by counsel in opposition to the issuance of any process based on such complaint unless there is an imminent threat of bodily injury, of the commission of a crime, or of flight from the commonwealth by the person against whom such complaint is made." G.L. c. 218, § 35A. See *Victory Distributors, Inc. v. Ayer Div. of Dist. Court Dept.*, 435 Mass. 136, 140 (2001). Section 35A authorizes clerk-magistrates to preside over such hearings. G.L. c. 218, § 35A. The hearings are held "for the protection and benefit of the accused," and "allows the clerk-magistrate to screen out baseless complaints with minimal harm to the accused's reputation." *Eagle-Tribune Publ'g Co. v. Clerk-Magistrate*, 448 Mass. 647, 656 (2007).

In addition to providing a mechanism for determining whether probable cause exists to support a public accusation against a person who has not been arrested, Section 35A "was designed to encourage informal resolution of private disputes and minor criminal matters." *Commonwealth v. Lyons*, 397 Mass. 644, 647 (1986). The Legislature, by not requiring magistrates to issue complaints applied for by non-law enforcement applicants despite being supported by probable cause, recognizes "that circumstances will exist when, notwithstanding the existence of probable cause, a complaint should not issue and that, in such circumstances, a clerk-magistrate has discretion to refuse to issue complaints." *Victory Distributors, Inc. v. Ayer Div. of Dist. Court Dept.*, 435 Mass. 136, 142 (2001). "The implicit purpose of the § 35A hearings is to enable the court clerk to screen a variety of minor criminal or potentially criminal matters out of the criminal justice system through a combination of counseling, discussion, or threat of prosecution." *Commonwealth v. Cote*, 15 Mass. App. Ct. 229, 235 (1983). See also *Bradford v. Knights*, 427 Mass. 748, 751 (1998) (commending the use of show cause hearings "to effect an informal settlement of grievances" and noting that "if that happens regularly, it is reason enough for the procedure"). "Informal dispute settlement processes available to the parties . . . are likely to be more successful if entered into before the issuance of a summons against the defendant." *Gordon v. Fay*, 382 Mass. 64, 70 (1980).

In 1975, in an effort to provide more uniform practice to the complaint procedure, particularly with respect to a person who has not been arrested, Chief Justice Franklin N. Flaschner, then Chief Justice of the District Court, promulgated Standards of Judicial Practice: The Complaint Procedure. The commentary to Standard 1:00 noted that the objective in

promulgating the standards was "not to create an operating manual for the District Court, but rather to define suitable procedures, specific enough to be meaningful and practical, yet general enough to permit variations in application."

In 2008, the District Court promulgated amended Standards to incorporate the subsequent appellate decisions and statutory and rules amendments, and to recognize the technological updates of the District Court, including a computerized complaint form allowing for a single multi-count complaint and uniform complaint charging language. Like its predecessor, the Standards were not declared to be mandatory, but rather "represent a qualitative judgment as to best practices in each of the various aspects of the Complaint procedure." Standards, 2018, Introductory Note.

While the Standards have not been specifically promulgated for use by other court departments, appellate courts have measured the practices of other court departments by the Standards. See e.g., *Bradford v. Knight*, 427 Mass. 748, 753-54 (1998), *Commonwealth v. Clerk of the Boston Div. of the Juv. Court Dept.*, 432 Mass. 693, 702 n.13 (2000).

III. Recommendations

1. *The Standards should be reviewed in their entirety and updated.*

The Working Group was very impressed with the comprehensive guidance that the Standards provide and, in general, found the provisions and commentary to accurately reflect the current state of the law. That said, the Working Group unanimously agreed that the Standards should be reviewed in their entirety and updated as needed. Such work, however, is beyond the scope of this Working Group and the Working Group recommends that either the same procedure employed in updating the 1975 Standards be followed or a new cross-departmental committee be formed. While the Working Group received comments from various stakeholders, including a request to be given a voice in the process, the Working Group notes that the Standards explicitly provide that:

> These Standards may be amended from time to time. Comments and suggestions on how they may be improved are always welcome and should be sent to the Administrative Office of the District Court, Two Center Plaza, Boston, MA 02108.

Of course, the address of the Administrative Office should be updated to reflect its current location at 24 New Chardon Street, Boston, MA 02108, but the Administrative Office continues to receive anything addressed to this previous address. The Working Group expects that such comments will continue to be welcome.

The Working Group did not focus on specific provisions that should be updated beyond the ones outlined in this report, but does recommend that the update of the standards include updating the forms used, including the forms used to notify the applicant and accused of the show cause hearing to provide greater clarity about both the process and the hearing itself.

2. *The Standards should be promulgated jointly by the District Court and Boston Municipal Court departments.*

The Working Group recommends that the District Court and Boston Municipal Court departments follow the same standards.[1] The Working Group is in agreement that uniform statewide standards provide helpful guidance to both the court and the public. The Boston Municipal Court department has represented that it is interested in adopting joint standards with the District Court department, but noted that, preliminary to its determination of whether all provisions should apply to both court departments, the Standards should be updated as noted in paragraph A., *infra*.

3. *The provisions in the Standards related to hearings on felony offenses should not be amended.*

The Working Group considered whether provisions in the Standards related to hearings on felony offenses should be amended, and concluded that the existing standards comply with the current state of the law and do not require amendment.

The statutory authority for show cause hearings is set forth in G.L. c. 218, § 35A. When the statute was originally enacted in 1943, the first sentence provided that "if a complaint is received by a . . . clerk," the accused could request a show cause hearing. St. 1943, c. 349, § 1. The 1943 version of the statute did not distinguish between felony and misdemeanor complaints. The statute was subsequently amended in 1945 to provide that an accused could request a show cause hearing "if a complaint for a misdemeanor is received by a . . . clerk," thus limiting show cause hearings to complaints for misdemeanor offenses. St. 1945, c. 293.

In 2003, the Supreme Judicial Court examined G.L. c. 218, § 35A, which still contained the misdemeanor qualification in the first sentence, and concluded that the language of the statute limited the availability of show cause hearings to misdemeanor offenses. *See Commonwealth v. Clerk-Magistrate of W. Roxbury Div. of Dist. Court Dep't*, 439 Mass. 352 (2003).

In 2004, following the decision in *Commonwealth v. Clerk-Magistrate*, § 35A was amended, and among other changes, the words "for a misdemeanor" in the first sentence were removed, appearing to demonstrate the Legislature's intention to allow for show cause hearings in the case of both misdemeanor and felony complaints. *See* St. 2004, c. 149, § 200. The statute was also amended to eliminate the requirement that the accused make a written request for a show cause hearing, and instead required the scheduling of a show cause hearing "in the case of a complaint for a misdemeanor or a complaint for a felony received from a law enforcement officer who so requests." The amendments additionally included language providing a magistrate with discretion to schedule a show cause hearing on an application for complaint for a felony from a private complainant.

[1] Although G.L. c. 276, § 35A also applies to the Juvenile Court and Housing Court departments, the Working Group was only asked to consider whether the District Court and Boston Municipal Court departments should adopt joint standards.

Standard 3:08 addresses felony charges sought by law enforcement officers. As provided in G.L. c. 218, § 35A, Standard 3:08 advises that a magistrate must schedule a show cause hearing on a felony application for complaint where a police complainant so requests and where none of the three statutory exceptions (imminent threat of (1) bodily injury; (2) the commission of a crime; or (3) flight from the commonwealth by the accused) applies. Accordingly, where a law enforcement officer seeks a complaint for a felony charge and does not request a hearing, Standard 3:08 provides that the law enforcement officer is entitled to an immediate determination by a magistrate whether probable cause to authorize a criminal complaint exists. If the magistrate finds probable cause for the complaint, then a summons should issue in accordance with G.L. c. 276, § 24 and Mass. R. Crim. P. 6, unless the magistrate finds that an arrest warrant is necessary because the defendant may not appear unless arrested.

As set forth in Standard 3:09, a private complainant may seek felony charges against an accused. Section 35A provides that a magistrate has discretion as to whether to schedule a show cause hearing to provide the accused an opportunity to be heard. However, if one of the three statutory exceptions set forth in the statute applies, the magistrate must determine probable cause without scheduling a show cause hearing. Standard 3:09 encourages magistrates to schedule show cause hearings on applications by private complainants unless public safety or other reasons exist for not doing so.

4. *The Standards should be amended to clarify the rights of an applicant for a criminal complainant, if dissatisfied with the decision made by the Clerk-Magistrate*.

As set out below, the Working Group recommends that the Standards be amended to clarify the rights of an applicant for a criminal complaint if dissatisfied with a Clerk-Magistrate's decision.

Although the Legislature has authorized a private party to seek a criminal complaint, a private party has no judicially cognizable interest in the prosecution of another and thus the denial of a private party's complaint creates no judicially cognizable wrong. *Bradford v. Knights*, 427 Mass. 748, 751 (1998) (citing *Whitley v. Commonwealth*, 369 Mass. 961, 962 (1975); *Taylor v. Newton Div. of the Dist. Court Dep't*, 416 Mass. 1006 (1993)). Nevertheless, an applicant whose application for complaint has been denied has two avenues of recourse. First, an applicant may ask the court for a redetermination of the denial of the complaint. *Id.; Commonwealth v. Orbin O.*, 478 Mass. 759, 764 (2018). Because the court has the inherent authority to, in a timely and regular way, rehear and reconsider its own determination, a judge of the same court may rehear a clerk-magistrate's decision. *Bradford*, 427 Mass. at 752. Second, an applicant may request that the Attorney General or District Attorney review his or her allegations for prosecution. *Orbin O.*, 478 Mass. at 764. "'Should one of these authorities decide to prosecute, neither a judge of the District Court nor a clerk-magistrate may bar the prosecution, as long as the complaint is legally valid.'" *Id.* (quoting *Victory Distribs., Inc. v. Ayer Div. of the Dist. Court Dep't*, 435 Mass. 136, 143 (2001)).

As set out in the Standards, the process for an applicant dissatisfied with a clerk-magistrate's denial of a complaint is as follows:

> If the magistrate denies a complaint, the complainant may not appeal the magistrate's determination, but may request a judge to redetermine the matter. If a complainant manifests serious dissatisfaction with the magistrate's denial of a complaint, the magistrate should inform the complainant that a judge has discretion whether or not to redetermine the matter. If such a redetermination is requested, the magistrate should provide the judge with the application and any supporting materials so that the judge may properly decide the request.
>
> The judge has discretion to consider the application de novo, or merely to review the factual allegations previously provided to the magistrate, or to deny redetermination. The judge may limit any redetermination to the information previously provided to the magistrate or may allow additional evidence or argument from the parties or counsel. If the judge hears evidence or argument, the judge should afford the accused an opportunity to be heard if required by G.L. c. 218, § 35A or if the magistrate heard from both parties.

Standards, § 3:22. The Commentary to § 3:22 further provides: "[s]ince a magistrate's decision is not appealable as of right, in order to insure public confidence a judge should consider allowing a redetermination when the complainant provides a reasonable basis for challenging the magistrate's decision. A new hearing need not follow every denial of process. A judge might require a dissatisfied complainant to explain in writing why a redetermination should be made before deciding whether to grant the request." Although the Standards advise that a clerk-magistrate may defer action on an application and direct the applicant to the Attorney General or District Attorney, Standards, § 3:06, they do not advise that a clerk-magistrate notify an applicant whose application has been denied that he or she may request the Attorney General or District Attorney to review for prosecution.

As explained in *Eagle-Tribune Publ'g v. Clerk-Magistrate of the Lawrence Div. of the Dist. Court Dep't*, 448 Mass. 647, 656 (2007), show-cause hearings are generally not open to the public so as to foster candid and open discussion that may facilitate an informal settlement of grievances short of prosecution. For this reason, that an applicant may seek redetermination by a judge serves to "insure public confidence by allowing a redetermination process when the applicant provides a reasonable basis for challenging the magistrate's decision." Standards, Commentary to § 3:22. That an applicant may also ask the Attorney General or District Attorney, as the community's elected representative designated with the authority to determine which cases to prosecute, to review a case for prosecution similarly promotes public confidence that appropriate matters will be prosecuted.

With these points in mind, the Working Group recommends that § 3:22 be amended in the following respect so as to promote public confidence and uniformity in the process:

- The requirement that an applicant manifest "serious dissatisfaction" with the denial of a complaint is a standard that is not applied elsewhere in our body of law, thus making it susceptible to differing interpretations that may lead to inconsistency among the many courts considering whether and when to inform an applicant that he or she may seek redetermination by a judge.

Consequently, the requirement that a complainant manifest "serious dissatisfaction" with the denial of a complaint before the clerk-magistrate informs the applicant that a judge may redetermine the matter should be abandoned in favor of a procedure whereby each applicant be provided notice that they may seek redetermination of a denial of a complaint by a judge and that he or she may request the Attorney General or District Attorney to review the allegations for prosecution.

To promote uniformity, consideration should be given to informing an applicant that he or she may seek redetermination by a judge or request the Attorney General or District Attorney review the allegations in writing on a notice setting the date for the clerk-magistrate's hearing on the application and on a notice of the clerk-magistrate's determination on an application for criminal complaint. In addition, consideration should be given to the creation of a form motion for redetermination of denial of a complaint that would be available to all applicants.

- Consideration should be given to requiring that every redetermination of an application for criminal complaint be scheduled for a hearing before a judge, at which the judge may, in his or her discretion, make a determination on the record whether to rehear the application. In making this determination, the judge would be entitled to rely on the written or audio-recorded record of evidence presented to the clerk-magistrate, request additional argument, or conduct a de novo hearing.

- Consistent with § 2:05 of the Standards governing a judge's redetermination of the denial of an application for complaint against a person who was arrested, redetermination hearings of a denial of an application for complaint filed against a person who has not been arrested should be recorded but not open to the public except in those cases where the legitimate public interest outweighs the accused's right of privacy.

5. *The Working Group recommends consideration of the following factors on the issue of whether to open a show cause hearing to the public.*

The Working Group finds that the considerations set forth in § 3:15, which draw on the Supreme Judicial Court's decisions in *Eagle-Tribune Pub. Co.* 448 Mass. 647, 656-57 (2007) and *George W. Prescott Pub. Co. v. Register of Probate for Norfolk county*, 395 Mass. 274, 277 (1985), already provide a useful framework to address whether to open a hearing or make the records of such a hearing available to the public. Specifically, the commentary to § 3:15 notes, consistent with the case law, that the accused is ordinarily entitled to privacy at this early stage and that public hearings are the exception rather than the rule, but that the public's legitimate interest in access may overcome the accused's privacy interests where an incident has already garnered public attention or where the accusation involves non-frivolous accusations of

misconduct in public office. The commentary to § 3:15 further provides that the fact that an accused may be well-known or a public official is not itself a sufficient reason to open a show-cause hearing to the public. Section 5:02 of the current Standards counsels that the same considerations apply for post-hearing requests for records of a matter in which a complaint did not issue.

Despite this existing guidance, the Working Group recommends, as part of its overall recommendation that the Standards be reviewed and updated, attention be given to identifying "best practices" for determining whether to open a hearing to the public or to make records of a hearing available to the public. As part of that review and update, consideration should be given to providing more guidance and clarification regarding the factors set out in § 3:15 (and, correspondingly, § 5:02) for determining whether the public has a legitimate interest in access to the hearing or to the records of such a hearing.

To that end, the working Group recommends that the following factors be added to those considerations already identified in § 3:15:

- The magistrate should consider whether there has been prior publication of the name of the accused or the conduct for which the accused has been charged;

- The magistrate should consider opening the hearing to the public when the accused or complainant is a public official or public employee. However, the fact that the accused or complainant is a public official or public employee should not, by itself, be a basis to make a hearing or the records available to the public.

- When determining whether the accusations are of legitimate public concern and the accused is a public official or employee, the magistrate should consider whether the accused's conduct is relevant to the conduct of his or her office, misuse of authority, or are allegations of official wrongdoing.

- The magistrate should consider both the nature of the offense and the strength of evidence in support of the allegation.

The Working Group also recommends that the Standards be amended to reflect that the judge or magistrate presiding over the hearing may open the hearing or the records of a hearing to the public *sua sponte*. The standards should also reflect that a magistrate retains discretion to notify an accused of a request for public access to a hearing or the records thereof or where the magistrate intends to open a hearing or the records of a hearing to the public *sua sponte*. In such instances, the magistrate retains discretion to permit the accused an opportunity to address whether a hearing or the records of a hearing should be open to the public.

Additionally, consideration should be given to the procedure governing a request to open a hearing or make records available to the public. A form for a request to open a hearing or make records public should be created and made available to the public, and, consistent with §

3:15, the magistrate's findings and order on such a request should be written and maintained in the record.

Finally, the Working Group recommends that, in those instances in which a hearing has been opened to the public, notice of the hearing should be publicly available in the same manner as criminal cases generally.

6. *The Working Group recommends deferring consideration of whether to adopt a policy requiring the recording of all show cause hearings conducted by a magistrate other than a judge until resolution of pending litigation regarding the records of show cause hearings.*

When the 1975 Standards were updated in 2008, a new provision was added regarding the recording of show cause hearings. Standard 3:16, Recording show cause hearings. The 2008 Standards contemplated the ability to utilize recording technology as one of the ways to memorialize the evidence on which the magistrate relies to establish probable cause for the complaint, but, consistent with the governing procedural rules, did not mandate this be the only way for a magistrate to memorialize a probable cause finding. See Mass. R. Crim. P. 3(g) (requires facts supporting probable cause to be "either reduced to writing or recorded"). See also District Court Special Rule 211(A)(1) (excluding "proceedings conducted by a magistrate other than a judge" from the District Court and Boston Municipal Court proceedings that are required to be recorded).

Rather than mandating electronic recordings of show cause hearings conducted by a magistrate other than a judge, Standard 3:16 "strongly recommend[s]" the recording of such hearings "subject to the availability of appropriate recording devices." Show cause hearings conducted by a judge, however, are required to be electronically recorded. Standard 3:16 commentary, citing District Court Special Rule 211(A)(1). While the Standards do not apply to the Boston Municipal Court, Rule 15 of the Special Rules of the Boston Municipal Court Department Sitting for Criminal Business[2] also requires show cause hearings conducted by a judge to be electronically recorded.

Recognizing that a show cause hearing is for the benefit of the accused, at which the accused is provided an opportunity to be heard on whether probable cause exists to support the charge and to allow for informal dispute settlement processes, the law and governing rules mandate recording of show cause hearings conducted by a magistrate other than a judge when requested by the accused. See G.L. c. 221, § 91B (authorizing accused to record show cause hearing). See also District Ct. Special Rule 211(B)(2); Special Rule of the Boston Municipal Court Department Sitting for Civil Business 308(B)(2). Both the District Court and Boston Municipal Court Special Rules also mandate recording upon the complainant's request. *Id*.

Since the implementation of the 2008 Standards, approximately 1/3 of the 62 divisions of the District Court department electronically record show cause hearings conducted by magistrates without requiring a request from either the accused or complainant. None of the

[2] Rule 15 provides that the "[r]ecording of court proceedings is governed by Rule 308 of the Special Rules of the Boston Municipal Court Department Sitting for Civil Business."

divisions of the Boston Municipal Court record show cause hearings conducted by a magistrate other than a judge absent a request from either the accused or the complainant.

The question has now been raised whether it should be required that all show cause hearings conducted by a magistrate other than a judge be electronically recorded without the need for a request by the accused or complainant.

The Working Group recommends deferring consideration of this issue until after the Supreme Judicial Court has resolved the issues reported to the full bench by the single justice regarding the records of show cause hearings as a result of the litigation filed by the Boston Globe, Boston Globe Media Partners, LLC v. Chief Justice of the Trial court & another, SJ-2018-458.

7. *Data collection recommendations*.

A. MassCourts should be updated to ensure accurate data collection.

The options available to personnel in Clerks' Offices to docket the outcome of show cause hearings in MassCourts are numerous, and, in many instances, are duplicative of one another. The availability of these numerous and duplicative options, combined with varying docketing practices among different divisions throughout the District and Boston Municipal Courts, result in inconsistent data. Moreover, on a practical level, some of the coding options available create MassCourts docket entries that may not provide sufficient information for a court user reading a MassCourts docket to discern the outcome of the show cause hearing. Accordingly, as it did in the case of the Standards themselves, the Working Group unanimously agreed that the MassCourts coding and related set-up concerning show cause hearings should be reviewed in their entirety, and revised to provide a more concise and accurate list of result codes with clearer descriptions.

In order to ensure continued consistency in data collection, the Working Group recommends that once MassCourts has been updated, the respective departments' administrative offices should provide uniform MassCourts training. The Working Group would also recommend that, after MassCourts is updated, requests for the addition of new codes relating to show cause hearings be directed to the administrative offices of the District Court and the Boston Municipal Court, or through a designated standing committee, so that an assessment can be made as to the necessity of additional code options.

B. MassCourts changes should be consistent with any new forms.

As noted above, the Working Group recommends that the group charged with reviewing and revising the Standards also update the forms used in connection with show cause hearings, including the "Court Use Only" section of the Application for Complaint, which provides the options for the magistrate to record the result of a show cause hearing. The Working Group recommends that any changes made to MassCourts, and specifically the MassCourts result codes, be consistent with changes made to the forms relating to show cause hearings.

8. *Clerk-Magistrates and Assistant Clerk-Magistrates of the District Court and Boston Municipal Courts should receive uniform training.*

The Working Group recommends that all Clerk-Magistrates and Assistant Clerk-Magistrates of the District Court and Boston Municipal Court departments receive training from their respective department's administrative office specific to the complaint procedure in conjunction with the promulgation of updated and joint Standards as referenced in subsections A and B, *infra*. This training, which should be a uniform training targeting all procedural and substantive aspects of the updated Standards, should be provided on a continuing basis to ensure new Clerk-Magistrates and Assistant Clerk-Magistrates also receive this training.