

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

**TRIAL COURT RULE XIV
UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS**

TABLE OF CONTENTS

RULE 1. SCOPE AND DEFINITIONS

- (a) Purpose
- (b) Scope
- (c) General Policy
- (d) Types of Access
- (e) Definitions

Notes

RULE 2. ACCESS TO COURT RECORDS IN A COURTHOUSE

- (a) Scope
- (b) Request
- (c) Reasonable Limits
- (d) Production
- (e) Exhibits
- (f) Computer Kiosk
- (g) Impounded Records
- (h) Available Formats for Reproduction
 - (1) Paper copy
 - (2) Printout
 - (3) Reproduction by court-provided machine
 - (4) Audio or audiovisual recording
 - (5) Electronic document
 - (6) Additional formats
- (i) Fee
- (j) Requester's Self-Service Duplication of a Court Record
 - (1) Handheld device
 - (2) Sheet-fed or flatbed scanner

Notes

RULE 3. REQUESTS FOR COMPILED DATA

- (a) Procedure for Making Requests
- (b) Determination
- (c) Fees
- (d) Conditions

Notes

RULE 4. REQUESTS FOR BULK DATA

Notes

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

RULE 5. REMOTE ACCESS TO ELECTRONIC COURT RECORDS

- (a) Remote Accessibility to Information in Electronic Form Through the Public Portal
 - (1) Civil cases
 - (i) Generally
 - (ii) Search
 - (iii) Exemption of certain civil case types
 - (2) Criminal cases
 - (i) Generally
 - (ii) Search
 - (iii) Exemption of certain criminal case types
- (b) Remote Accessibility to Information in Electronic Form Through the Attorney Portal
- (c) Nonparty Information
- (d) Availability of Additional Records
- (e) No Creation of Rights

Notes

RULE 6. CORRECTION OF CLERICAL ERROR IN ELECTRONIC DOCKET ENTRY

Notes

Addendum, Records Excluded from Public Access

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

RULE 1. SCOPE AND DEFINITIONS

(a) Purpose. These rules are intended to provide public access to court records and information while protecting the security and privacy of litigants and non-litigants.

(b) Scope. These rules govern access to the court records of the Trial Court. These rules apply to all court records, regardless of the physical form, method of recording, or method of storage, subject to these rules and the technological capacity of the Trial Court to make such a court record available. Administrative records of the Trial Court are not within the scope of these rules.

(c) General Policy. Publicly available court records in the custody of a Clerk and located in a courthouse shall be available to any member of the public for inspection and/or copying during the regular business hours of the court, consistent with these rules. Electronic court records may be made available in part or in their entirety at the courthouse consistent with Rule 2, as compiled data consistent with Rule 3, or by remote access consistent with Rule 5.

(d) Types of access. Access to court records may be courthouse access or remote access. Courthouse access includes requests to the Clerk at the counter and access through a computer kiosk. Remote access includes both an Internet-based portal for the public and an Internet-based Attorney's Portal for registered Massachusetts attorneys.

(e) Definitions.

“Access” means the ability to inspect and obtain a copy of a court record.

“Administrative record” means any record pertaining to the management, supervision, or administration of the Trial Court, including any court department, committee, or board appointed by or under the direction of the Trial Court or any department thereof, the Office of the Commissioner of Probation, Office of the Jury Commissioner, or the office of any Clerk.

“Bulk data” means electronic court records as originally entered in Trial Court case management database(s), not aggregated or compiled by computerized searches intended to retrieve specific data elements.

“Compiled data” means electronic court records that have been generated by computerized searches of Trial Court case management database(s) resulting in the compilation of specific data elements.

“Clerk” means a Clerk, Clerk-Magistrate, Register of Probate, Recorder of the Land Court, and their assistants or designees.

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

“Court” means any department of the Trial Court.

“Court record” means all or any portion of court papers, documents, exhibits, orders, recordings, and other records that are made, entered, filed, and/or maintained by the Clerk in connection with a case or proceeding.

“Docket” means the paper or electronic list of case information maintained by the Clerk that contains the case caption, case number, and a chronological entry identifying the date and title of each paper, order, or judgment filed in a case, and the scheduling and occurrence of events in the case.

“Electronic court record” means the whole or partial information content of court records, stored in an electronic database. This shall include an audio or video recording, analog or digital, of an event, to the extent permitted by these rules and subject to the Trial Court’s technological capacities.

“Prohibited from public disclosure” means any court record, or portion thereof, to which public access is restricted pursuant to any Federal or state statute, court rule, standing order, case law, or court order.

“Public” or “member of the public” means any person and any business or non-profit entity, association, or government entity, or organization, including the media, who seeks access to a court record. The term “public” does not include (1) Judicial Branch staff, acting in their official capacities; (2) authorized persons or entities, private or governmental, who assist the court in providing court services; (3) public agencies or law enforcement departments whose access to court records is defined by statute, court rule, standing order, case law, or court order; and (4) the parties to a case, their lawyers, victims as authorized by G.L. c. 258B, § 3, or their authorized representatives requiring access to the court record in a specific case.

“Publicly available court record” means any court record that is not prohibited from public disclosure.

“Remote access” means accessing court records through electronic means from outside a courthouse.

NOTES

Rule 1(a), Purpose. These rules are intended to provide public access to designated publicly available court records and information, while protecting the security and privacy of litigants and non-litigants.

Rule 1(b), Scope. These rules govern access by the public to the court records maintained by a Clerk in a court, whether the court record is maintained in paper or electronic form.

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

These rules apply only to access to court records by the public. The rules do not limit access to court records by a party to an action or proceeding, by the attorney or authorized representative of such party, by Judicial Branch staff or those entities which assist the Judicial Branch in providing services, or any other persons or entities entitled to access by Federal or state law, statute or rule, unless otherwise required by law or court order.

Rule 1(c), General Policy. Court records in the custody of a Clerk shall be available for public access during normal business hours consistent with these rules, unless otherwise prohibited by law or court order. A judge has the authority to impound an otherwise public court record. See Trial Court Rule VIII, Uniform Rules on Impoundment Procedure (as amended effective October 1, 2015).

Massachusetts has long recognized that the public has a common law right of access to certain court records. New England Internet Café, LLC v. Clerk of the Super. Ct. for Criminal Bus. in Suffolk Cnty., 462 Mass. 76, 82-83 (2012), citing Republican Co. v. Appeals Ct., 442 Mass. 218, 222 (2004). See also Massachusetts Body of Liberties, art. 48 (1641) (“Every inhabitant of the Country shall have free liberty to search and review any rolls, records or registers of any Court or office”). Therefore, most court records are presumptively public documents, unless required to be withheld from public inspection by statute, court rule, standing order, case law, or court order. New England Internet Café, LLC, 462 Mass. at 83, citing Republican Co., 442 Mass. at 222-223. See also Boston Herald, Inc., 432 Mass. at 608; Newspapers of New England, 403 Mass. at 631-632, 637. This right of public access has been described as the “general principle of publicity,” applicable to court records and court proceedings. Ottaway Newspapers, Inc. v. Appeals Ct., 372 Mass. 539, 546 (1977). The general principle of publicity is enhanced by a qualified First Amendment right of access in criminal proceedings. See Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Div. of the Dist. Ct. Dep’t, 403 Mass. 628, 635 (1988) (stating that there is “a two-part test for determining whether a First Amendment right of access applies to any particular proceeding. First, the proceeding must have an historic tradition of openness, and second the public’s access must play ‘a significant positive role in the functioning of the particular process in question.’”). The Supreme Judicial Court recognizes the qualified right of public access to court records in criminal proceedings. See Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 606–08 (2000) (“balancing the public’s right to inspect documents against a defendant’s rights guaranteed by the Sixth Amendment to a fair trial.”).

However, while the public has a right to obtain a copy of a court record, subject to the procedures described in Rule 2, the presumption of public access is not absolute. Commonwealth v. Winfield, 464 Mass. 672, 674 (2013). See also Commonwealth v. Pon, 469 Mass. 296, 312 (2014) (“Although this common-law presumption [of public access to judicial records] is of paramount importance, like its constitutional counterpart, it is not absolute”) (alterations added); Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) (“It is uncontested ... that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

access has been denied where court files might have become a vehicle for improper purposes.”). The public’s qualified right of access includes the right to view or “inspect” a *non-impounded* record free of charge during the court’s regular business hours. A limitation of this right exists in the court’s “inherent equitable power to impound its files in a case and to deny public inspection of them when justice so requires.” George W. Prescott Pub. Co. v. Reg. of Probate for Norfolk Cnty., 395 Mass. 274, 277 (1985), quoting Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 158 (1945). Such a restriction on public access to records requires a showing of good cause. “[A] judge must balance the rights of the parties based on the particular facts of each case and take into account all relevant factors, including but not limited to the nature of the parties and the controversy, the type of information and the privacy interests involved, the extent of community interest, and the reason for the request.” New England Internet Café, LLC, 462 Mass. at 83 (citations omitted).

Clerk’s Responsibilities. Pursuant to S.J.C. Rule 3:12, Canon 3(A)(6), the “Clerk-Magistrate shall facilitate public access to court records that, by law or court rule, are available to the public and shall take appropriate steps to safeguard the security and confidentiality of court records that are not open to the public.” A Clerk “shall have responsibility for the internal administration of his office, including personnel, staff services and record keeping.” State Bd. of Retirement v. Bulger, 446 Mass. 169, 176 (2006), quoting G.L. c. 218, § 8. Clerk-magistrates maintain “all records, books and papers” filed in “their respective offices,” G.L. c. 218, § 12, and must make available public documents on request and keep impounded documents under seal. In re Powers, 465 Mass. 63, 67 (2013). Essential to these duties is the Clerk’s responsibility for the integrity of court records by protecting such records from any unauthorized alteration, mutilation, or theft.

Record Retention. The retention and eventual destruction of court records in the Trial Court are governed by Supreme Judicial Court Rule 1:11. The Massachusetts public records statute, G.L. c. 66, § 10, and its Federal counterpart, the Freedom of Information Act, 5 U.S.C. §§ 551 and 552, do not apply to records of the Judicial branch. See G.L. c. 4, § 7, Twenty-sixth; G.L. c. 66, § 10; Kettenbach v. Board of Bar Overseers, 448 Mass. 1019, 1020 (2007); Lambert v. Executive Dir. of the Judicial Nominating Council, 425 Mass. 406, 409 (1997); New Bedford Standard-Times Pub. Co. v. Clerk of the Third Dist. Ct. of Bristol, 377 Mass. 404, 407 (1979); Ottaway Newspapers, Inc. v. Appeals Ct., 372 Mass. 539, 545-546 (1977); Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 157 (1945); Peckham v. Boston Herald, Inc., 48 Mass. App. Ct. 282, 286 n.6 (1999). See also G.L. c. 66A, § 1 (Fair Information Practices Act limited to executive branch agencies and legislatively-created authorities); 801 Code Mass. Regs. § 3.01(3) (“Freedom of Information” regulations [801 Code Mass. Regs. § 3.00 et seq.] limited to executive branch agencies); 950 Code Mass. Regs. § 32.03 (2015) (public records regulations inapplicable to judicial branch).

Rule 1(d), Types of Access. The Trial Court offers several different methods of access to publicly available court records. The traditional and most common method is through a request at the counter of a Clerk’s office for the assistance of court personnel in

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

obtaining a case file. Because many court records are now maintained in electronic case management databases, most courts also maintain in the Clerk's office a public computer kiosk at which members of the public may search and access court information. These types of access are governed by Rule 2. In addition, remote access through the Internet is available in two forms. The first is a public portal through which members of the public may search and access electronic records. The second is the so-called Attorney Portal, which allows registered Massachusetts attorneys access to information and calendar events about cases in which they have appeared. These types of access are governed by Rule 5. Finally, in circumstances described in Rule 3, the Court Administrator may provide data compiled from the electronic case management databases.

Rule 1(e), Definitions. Rule 1(e) contains the definition of terms used in the rules. "Administrative record" as defined in Rule 1(e) includes any information maintained by the Trial Court that is not a court record. This definition includes records kept by the Trial Court that are not filed in relation to the litigation or resolution of a specific case or proceeding (e.g., court e-mail, inter-office memoranda, personnel information, travel vouchers, etc.); administrative and management reports of the Trial Court; and information gathered, maintained, or stored by a governmental agency or other entity to which the court has access but which is not part of the court record.

"Court record" means all or any portion of court papers, documents, exhibits, orders, recordings, and other records that are made, entered, filed, and/or maintained by the Clerk in connection with a case or proceeding. The definition of a "court record" includes an audio recording or official transcript of a proceeding, and any electronic duplicate or original court record. Commonwealth v. Winfield, 464 Mass. 672, 678-679 (2013), and cases cited therein; Commonwealth v. Silva, 448 Mass. 701, 706 n.8 (2007), quoting Boston Herald, Inc. v. Superior Court Dep't of the Trial Court, 421 Mass. 502, 505 (1995). A "court record" also includes a list identifying the names of jurors who have been empaneled and rendered a verdict in a criminal case. Commonwealth v. Fujita, 470 Mass. 484, 486 (2015). "Court record" does not include court papers, documents, exhibits, orders, and other records that are not filed with the court or otherwise created in connection with the case file. Commonwealth v. Winfield, 464 Mass. at 679. Discovery documents, interrogatories, backup room recordings, and other documents and recordings not filed with the court are not part of the "court record."

Court records do not include judicial work product related to the deliberative process, including confidential communications among judges and between judges and court staff made in the course of and related to their deliberative processes in particular cases. See Matter of the Enforcement of a Subpoena, 463 Mass. 162, 174-175, 178 (2012) (recognizing absolute judicial privilege protects confidential communications among judges and court staff).

As used in these rules, "court records" is the equivalent of "judicial record" as that term is used in the case law. See, e.g., Commonwealth v. Fujita, 470 Mass. 484, 487 (2015); Republican Co. v. Appeals Court, 442 Mass. 218, 222 (2004). These Rules, however, use the term "court record" instead of "judicial record" in order to be consistent

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

with other Rules of the Trial Court and the notes thereto. See, e.g., Trial Court Rule IX, Rule 2; Notes to Mass. R. Civ. P. and Mass. R. Dom. Rel. 12, 19, 41, 60, 63, 64; Notes to Mass. R. Crim. P. 4, 8, 12.

Prior Trial Court Administrative Orders. To the extent any preexisting administrative order of the Trial Court or the Chief Justice of the Trial Court are inconsistent with these rules, the rules control and govern future procedures and access to court records.

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

RULE 2. ACCESS TO COURT RECORDS IN A COURTHOUSE

(a) Scope. This rule governs the procedure for access to publicly available court records in a courthouse.

(b) Request. Any member of the public may submit to the Clerk at a courthouse a request to access a court record. The Chief Justice of each Trial Court Department may determine whether to require a written form for all requests. Such written request shall be in the form prescribed by the Chief Justice of the Trial Court and provide sufficient specificity to enable the Clerk to identify the requested court record. The requester shall not be required to disclose the reason for the request.

(c) Reasonable Limits. The Clerk may set reasonable limits on the time, location, volume, and manner of access to protect the integrity of the court record and to prevent undue disruption to the operations of the Clerk's office. Only the Clerk may add, remove, and replace records in the court's files.

(d) Production.

(1) The Clerk is responsible for providing access to all publicly available court records. The Clerk shall first determine whether the requested court record, or any portion thereof, is prohibited from public disclosure. The Clerk shall provide the record in the form requested by the public if practicable. The Clerk shall respond promptly upon receipt of a request for access to a court record.

(2) If the court record is stored outside the courthouse, is under review by a judge, or is otherwise not readily accessible by the Clerk, the Clerk will procure the court record or a duplicate in a reasonably timely manner and notify the requester when the court record may be accessed.

(e) Exhibits. The Clerk shall provide access, including reproduction, to documentary exhibits entered at a trial or hearing and retained by the court, unless the exhibits are contraband or are otherwise prohibited from public access, except where such access would pose a threat of deterioration or destruction of the exhibits. The Clerk may allow the public to view non-documentary exhibits, except where such access would pose a threat of deterioration, contamination, or destruction of the exhibits. The Clerk shall not allow the public to handle non-documentary exhibits without leave of court.

(f) Computer Kiosk. All publicly available electronic docket information shall be viewable at a computer kiosk or terminal located in the courthouse. There shall be no fee to access the kiosk. The Clerk may set reasonable limits on the time and volume of kiosk access to protect the Clerk's office from undue disruption and to promote access to the kiosk for all users.

(g) Impounded Records. A party or attorney who has entered an appearance in a case shall be allowed to access an impounded record in that case, except as

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

prohibited by law or court order. The Clerk shall verify the requester's identity and participation in the case before permitting access to any impounded court record.

(h) Available Formats for Reproduction.

(1) Paper copy. The Clerk shall produce a paper copy of any court record upon request.

(2) Printout. To the extent that publicly available court records are maintained in electronic form, upon request the Clerk shall provide a printout.

(3) Reproduction by court-provided machine. If the Clerk or the court makes a copy machine available for public use, the requester may make a copy of the court record for whatever cost is required by that machine.

(4) Audio or audiovisual recording. To the extent the Clerk or the court department maintains an audio or audiovisual recording of a public hearing or trial, the Clerk shall provide a copy upon request, subject to any statute, court rule, standing order, case law, or court order.

(5) Electronic document. If the court maintains a court record in electronic form (e.g., portable document format ["PDF"]), the Clerk may provide an electronic copy of the document upon request.

(6) Additional formats. If technologically feasible, the Clerk may provide a court record on a CD or DVD or other media, and may transmit the reproduction electronically.

(i) Fee. The Clerk shall charge a fee for its duplication or provision of any court record as prescribed in the Trial Court's Uniform Schedule of Fees. No fee shall be charged to view a court record without reproduction.

(j) Requester's Self-Service Duplication of a Court Record.

(1) Handheld device. The Clerk may allow a member of the public to use a personal handheld electronic imaging device (e.g., personal scanner, or, if permitted at the court location, a camera on a cell phone) to produce a copy of a court record. A fee shall not be charged for such reproduction.

(2) Sheet-fed or flatbed scanner. The Clerk may allow a member of the public to use a sheet-fed or flatbed scanner or imaging device to produce a copy of a court record. A fee shall not be charged for such reproduction.

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

NOTES

Rule 2(a), Scope. This rule governs the procedure for the public to obtain access to publicly available court records in a courthouse. Access to publicly available court records in a courthouse shall be provided in paper form and through a computer kiosk.

Rule 2(b), Request. Any member of the public may submit to the Clerk at a courthouse a request to access a court record. Each Department of the Trial Court may determine whether to require a written form for all requests or to permit oral and written requests. All written requests shall be submitted on a uniform form prescribed by the Chief Justice of the Trial Court. A written request form is not required to be retained by the Clerk after the court record has been returned. Each Clerk may elect to dispose or retain completed forms, but if retained, the forms should not be maintained in the court record or case file.

For security and record keeping purposes, the best practice, where feasible, is for the Clerk to require the requester to fill out a written form (or submit an electronic request) providing the requester's name and address and specifying the case name, case number, and document(s) requested. Neither the Clerk nor any request form may demand or require a reason for the request. Nonetheless, the Clerk may ask for such information because often such a simple inquiry enables the Clerk to assist the requester in focusing a request. The reason for a request might also inform a Clerk's use of discretion in determining the form in which the Clerk provides the record or any reasonable limits that should apply. Where a requester desires copy, it may be prudent for the request form to allow the requester to express a preference for a paper copy or a scanned, PDF electronic copy, as the Clerk should provide a copy in the form desired by the requester if practical. The Clerk shall charge and collect a fee for copying or scanning and providing a PDF as provided in the Uniform Schedule of Fees.

Rule 2(c), Reasonable Limits. The Clerk may set reasonable limits on the time, location, volume, and manner of access to protect the integrity of the court record and to protect the Clerk's office from undue disruption. See Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 505 (1989). In exercising the discretion contemplated in this rule, for example, the Clerk may reasonably limit the public's use of the Clerk's office lobby or space for the purposes of copying court records. The Clerk may also reasonably limit the devices used and the number of court records requested during a certain time period. In both of these circumstances, the Clerk may be guided by considerations including whether the use of the space or the number of requests negatively affects the Clerk's office staff's ability to perform other essential work, or whether the public's requests are negatively affecting the ability of other members of the public to access court records.

An original court record should not be taken from the Clerk's office without the Clerk's express permission or an order of the court. Transfer of the case file for the purposes of a judge's rotation, interdepartmental transfer, consolidation, or for an appeal, does not constitute the taking or removal of the court record. An order of the court is not

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

required for the court record, including information protected from public disclosure, to be transferred or sent to another court.

Rule 2(d), Production. To further the policy of general public access, the Clerk should accede to the requester’s choice of format unless doing so imposes a significant, unrecoverable cost or other burden on the Clerk or the court. For example, when requested, the Clerk should provide a copy as a PDF instead of as paper.

Rule 2(e), Exhibits. Documentary exhibits submitted to, and accepted by, a court in the course of adjudicatory proceedings are documents which the public shall be allowed to access and duplicate, unless the exhibits are contraband or are otherwise prohibited from public disclosure. In addition, a Clerk may withhold access to documentary exhibits if access poses a threat of deterioration or destruction of those exhibits.

Non-documentary exhibits pose special challenges, both logistical and pursuant to the Clerk’s statutory duty in criminal cases to “prevent . . . destruction or deterioration” of evidence. G.L. c. 278A, § 16(a). Accordingly, a Clerk may allow the public to view non-documentary exhibits in the Clerk’s possession, at least where such viewing would not pose a threat of deterioration or destruction of the exhibits. The Clerk shall not allow the public to handle non-documentary exhibits without leave of court.

The Clerk can allow access only to exhibits retained in the possession of the Clerk. In civil cases, the Clerk is not obligated to retain trial exhibits and such exhibits are routinely returned to the offering party once the appeal period has ended or earlier, if authorized by a judge. Business records produced pursuant to G.L. c. 233, § 79J, and hospital records under G.L.c.233, § 79, are to be returned “upon the completion of such trial or hearing.”

In criminal cases, pursuant to the Trial Court’s Exhibit Retention Policy in Criminal Cases, which is available on the Trial Court’s website, controlled substances and currency subject to civil forfeiture are returned to the Commonwealth at the completion of a trial or hearing. Other exhibits are retained by the Clerk for the period of time that the defendant remains incarcerated or under parole or probation supervision. The Clerk, however, has the discretion to return exhibits to the offering party whenever retention is impracticable, and the judge also has the discretion to order earlier return of exhibits. Because the Clerk has the statutory duty to “retain all such evidence or biological material in a manner that is reasonably designed to preserve the evidence and biological material and to prevent its destruction or deterioration,” G.L. c. 278A, § 16(a), public access to physical exhibits may be limited or impossible.

Rule 2(f), Computer Kiosk. This rule requires the Trial Court to provide the public with a computer kiosk or terminal for accessing electronic court records. Such electronic access may lead to requests for particular paper records, which will be handled as any such request would be handled. The Clerk may set reasonable restrictions on the

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

amount of time that any one person may use a computer kiosk, the number of searches, or the number of documents viewed, to ensure that the computer kiosk is not monopolized or misused.

Rule 2(g), Impounded Records. Only parties to and attorneys of record with an active appearance in a restricted case shall be granted access to the impounded court records in that case, unless the records are sealed or access is ordered otherwise.

Rule 2(h), Available Formats for Reproduction. This rule recognizes the variety of formats in which a court record exists and may be purchased, including a paper copy produced by a Clerk, a printout by the Clerk, reproduction by a machine made available for public use, audio or audiovisual recording, electronic form (e.g., portable document format (“PDF”), and on a CD or DVD or other device. For computer security reasons, the Clerk will not store electronic documents on a person’s self-provided flash drive, CD, DVD, or other media.

Rule 2(h)(3), Reproduction by Court-Provided Machine. Some courts and Clerk’s offices provide for public use a copy machine. In such locations, the public has the option to use the machine or request the Clerk to produce the copy. The cost for the public to use the machine is usually less than the fee required for the Clerk to produce the copy. No additional fee beyond the machine’s fee should be charged for a copy.

Rule 2(h)(4), Audio or audiovisual recording. To the extent the Clerk or the court department maintains an audio or audiovisual recording of a public hearing or trial, upon request the Clerk shall provide a copy, subject to any statute, court rule, standing order, case law, or court order. See Bledsoe v. Commissioner of Correction, 470 Mass. 1017, 1018 (2014) (“[W]e would expect that, if a DVD or other official record of a video conference exists, a litigant would be allowed to purchase it at his or her own expense. An official video record of a hearing would be no less of a judicial record than a transcript or audio cassette.”); Commonwealth v. Winfield, 464 Mass. 672, 679-680 (2013) (“Where an electronic recording of a proceeding is made in the absence of a court reporter, the court file contains either the recording itself or a log entry that would allow the public to know the beginning and end points of the proceeding so that they may obtain a copy of the recording.”); see also id. at 679 (“The First Amendment right of access to court trials includes the right to purchase a transcript of the court proceeding that was open to the public.”).

Rule 2(i), Fee. Pursuant to G.L. c. 262, § 4B, the Clerk shall charge a fee as set forth in the Trial Court’s Uniform Schedule of Fees. The Uniform Schedule of Fees is available on the Trial Court’s website

Rule 2(j), Requester’s Self-Service Duplication of a Court Record. This subsection is consistent with Supreme Judicial Court Rule 1:19(3), which states: “A judge may permit the use of electronic or photographic means for . . . the perpetuation of a record when authorized by law, for other purposes of judicial administration”

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

(1) Handheld Device. A member of the public may use a cellular telephone or other electronic imaging device to photograph or generate an image of a court record in a Clerk’s office provided doing so does not unreasonably interfere with the operation of the Clerk’s office, use a flash, or make an audio or video recording.

A “personal handheld scanner or electronic imaging device” includes a device held in one’s hand that is moved by hand across the document being scanned. This includes a battery operated electronic scanning device that does not leave marks on the court record or unreasonably interfere with the Clerk’s operations. The Clerk may exercise discretion not to permit any handheld device in order to maintain the integrity and format of the court records.

The Trial Court has adopted a Policy on Possession and Use of Cameras and Personal Electronic Devices (effective August 14, 2015). Under the policy, some Trial Court facilities do not permit the public to bring cellular telephones and other personal electronic devices into a court facility. The Trial Court’s policy and a list of the Trial Court facilities that have banned the public’s use of cellular telephones and PEDs is available on the Trial Court’s website. Rule 2(j) does not supersede a particular courthouse’s security regulations. If the court facility does not permit cell phones within the building, the requester may obtain a copy through other means identified in this rule.

In addition to the Trial Court policy, limits on use of cell phones in a Trial Court facility include a prohibition on using audio and video recording features. See Supreme Judicial Court Rule 1:19(1), Electronic Access to the Courts (“Covert photography, recording or transmission prohibited. No person shall take any photographs, or make any recording or transmission by electronic means, in any courtroom, hearing room, office, chambers or lobby of a judge or magistrate without prior authorization from the judge or magistrate then having immediate supervision over such place.”). See also Commonwealth v. Winfield, 464 Mass. 672, 677 (2013) (“[T]here is no constitutional right to bring cameras into or to make audio or video recordings of court room proceedings”), quoting Commonwealth v. Barnes, 461 Mass. 644, 651 (2012).

(2) Sheet-Fed or Flatbed Scanner. A sheet-fed scanner or a flatbed scanner is a portable scanner that rests on a flat surface and requires pages to be fed through the machine. It is similar to a copier. A document is typically placed onto the transparent glass of the scanner, where a scanner head assembly moves underneath the glass to capture the image contained on the document. To obtain a legible scan of a record contained in a bound volume using a flatbed scanner, it is necessary to press the volume against the glass until the page lies flat. Pressing a bound volume against the glass may leave a mark or impression on the original record. Similarly, separation of a document’s binding may be necessary. For reasons including potential harm to the original records, the Clerk may limit or prohibit scanning on a sheet-fed or flatbed scanner, and may condition such use on the person’s restoration of the binding to secure the document’s original condition.

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

RULE 3. REQUESTS FOR COMPILED DATA

(a) Procedure for Making Requests. Requests for compiled data may be made by any member of the public for scholarly, educational, journalistic, or governmental purposes. Such requests shall be made to the Court Administrator in such form as the Court Administrator may prescribe. Each request must (i) identify what compiled data is sought, and (ii) describe the purpose for requesting the compiled data.

(b) Determination. The Court Administrator, in consultation with the Chief Justice of the Trial Court, shall have discretion to grant or deny any request or part thereof for compiled data. The Court Administrator shall consider (i) whether the request is consistent with the purpose of these rules and (ii) whether the request may be compiled by the court without undue burden or expense. The Court Administrator shall not grant a request for data that is prohibited from public disclosure or for data where the electronic record is not an accurate representation of the official court record. The Court Administrator's decision shall be communicated to the requester with the reasons therefor.

(c) Fees. Upon allowance of a request, the Court Administrator may require the payment of a reasonable fee for staff time and resources to compile and provide the requested compiled data.

(d) Conditions. The Court Administrator may condition approval of a request for compiled data on the requester agreeing in writing to certain limitations on the use of the data, such as that it not be used for a commercial purpose.

NOTES

“Compiled data” is defined in Rule 1(e). Although the Trial Court seeks to provide access to electronic court records for purposes of transparency and accountability, it is also concerned about the potential for unwarranted harm to litigants, victims, witnesses and jurors that can come with unfettered access. Much of the information obtained by the court from litigants and non-parties is not provided voluntarily, but is required by the court both to provide fair and timely resolution of cases and to enhance public safety. The Trial Court's case management databases, which result in electronic records, are created to support those functions. Further the manner of collection and the definition of certain data may not result in an accurate representation of the underlying cases. The discretion vested in the Court Administrator under this rule is intended to address these concerns.

Regular Compiled Reports. The Trial Court provides a list on its website of publicly available reports, including annual and quarterly reports. The Trial Court may provide some reports to the public at no charge and other reports may be provided upon payment of a fee or subscription.

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

Rule 3(a), Procedure for Making Requests. In making a request for compiled data, a requestor shall describe the scholarly, educational, journalistic, or governmental purpose of the request. . It is within the discretion of the Court Administrator to deny requests that do not fit these purposes.

Rule 3(d), Conditions. The Court Administrator may condition the provision of compiled information on a requestor signing an agreement limiting the use of the information. For example, the Court Administrator may require that such information not be resold or used for a commercial purpose, except journalistic purposes.

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

RULE 4. REQUESTS FOR BULK DATA

Requests for bulk distribution of court record information shall not be granted except where explicitly required by law, court rule, or court order.

NOTES

“Bulk data” is defined in Rule 1(e). It is the policy of the Trial Court not to provide bulk distribution of electronic court data. An attempt to duplicate in whole or substantial part any of the case management databases would be burdensome to court personnel and could cause unwarranted harm to litigants, victims, witnesses, and jurors. The need for information from court databases for scholarly, educational, journalistic, or governmental purposes can be satisfied by the tailored provision of compiled data under Rule 3.

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

RULE 5. REMOTE ACCESS TO ELECTRONIC COURT RECORDS.

(a) Remote Accessibility to Information in Electronic Form Through the Public Portal. The following information in a publicly available court record shall be made remotely accessible to the public unless access is otherwise restricted or exempted under these rules:

(1) Civil cases.

- (i) Generally. Except as exempted in Rule 5(a)(1)(iii), the following information shall be viewable remotely in civil court records:
 - (A) The full name of each party and the related case or case number(s) by court department and division;
 - (B) The name and mailing address of each attorney who has entered an appearance for a party and of each self-represented litigant;
 - (C) The docket of a specific case; and
 - (D) Calendar information.
- (ii) Search. Civil cases may be searched by party name or case number.
- (iii) Exemption of certain civil case types. Abuse prevention and harassment orders and proceedings, and sexually dangerous person proceedings, shall not be available by remote access. Each Department of the Trial Court may request permission from the Chief Justice of the Trial Court to exempt certain additional civil case types or categories of information from remote access. A list of the approved exemptions shall be available on the Trial Court's website.

(2) Criminal cases.

- (i) Generally. Except as exempted in Rule 5(a)(2)(iii), the following information shall be viewable remotely in criminal court records:
 - (A) The full name of each defendant and the related case or case number(s) by court department and division;

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

- (B) The name and mailing address of each attorney who has entered an appearance and of each self-represented litigant;
 - (C) The docket of a specific case; and
 - (D) Calendar information.
- (ii) Search. Criminal cases may be searched by case number.
 - (iii) Exemption of certain criminal case types. Each appropriate Department of the Trial Court may request permission from the Chief Justice of the Trial Court to exempt certain criminal case types or categories of information from remote access. A list of the approved exemptions shall be available on the Trial Court's website.

(b) Remote Accessibility to Information in Electronic Form through the Attorney Portal. Attorneys who are licensed to practice in Massachusetts and have registered with the Massachusetts Trial Court shall have access to a portal providing remote access to all cases in which they have entered an appearance, and a calendar of scheduled events in such cases. The portable document format (PDF) version of certain publicly available court records, if so maintained by the court, may be made available on the Attorney Portal. Each appropriate Department of the Trial Court may request permission from the Chief Justice of the Trial Court to exempt certain criminal case types or categories of information from remote access.

(c) Nonparty Information. Information that specifically identifies an individual who is a witness in a criminal case, victim of a criminal or delinquent act, or juror shall not be stated in the caption of a filing.

(d) Availability of Additional Records. The Chief Justice of the Trial Court may determine that additional electronic court records or information may be made remotely accessible to the public.

(e) No Creation of Rights. This rule does not provide the public a right of access to any court record prohibited from public disclosure nor to the provision of remote access to all content of publicly available court records. The right of the public to access court records at a Clerk's office pursuant to Rule 2 shall not be limited by concurrent remote access.

NOTES

Rule 5(a), Remote Accessibility of Information in Electronic Form Through the Public Internet Portal. All publicly available docket information in civil and criminal proceedings, except those exempted pursuant to Rule 5(a)(1)(iii) and Rule 5(a)(2)(iii), shall be made available electronically to the extent that the public shall be able to search and view the information designated in this rule. At this time, this rule does not encompass remote access to audio, audiovisual, or electronic images, including portable document format (“PDF”) to the general public. The Chief Justice of the Trial Court has authority to expand remote access to include audio, audiovisual, or electronic images when technology and policy allow.

Rule 5(a)(1), Remote Accessibility of Civil Case Types. All civil case types not exempted by statute, rule, court order, standing order, or determination of the Chief Justice of the Trial Court shall be made available.

Exempted Civil Case Types. A list of exempted case types shall be maintained on the Trial Court’s website. A non-exhaustive list of exempted case types can also be found in Addendum A, “Records Excluded From Public Access.”

Notwithstanding amendments to the list of exempted case types, the following case types shall always remain exempted from the Internet portal:

Harassment and Domestic Abuse Records. The Federal Violence Against Women Act (VAWA) prevents the courts from displaying harassment and domestic abuse case types on the Internet. See 18 U.S.C. § 2265(d)(3) (“A State . . . shall not make available publicly on the Internet any information regarding the registration, filing of a petition for, or issuance of a protection order, restraining order or injunction, restraining order, or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order.”). Thus, cases and orders entered under G.L. c. 209A or G.L. c. 258E, as well as any similar order, shall not be made available through remote access.

Sexually Dangerous Person Proceedings. The court record in these proceedings conducted pursuant to G.L. c. 123A, § 1, et seq., often involve voluminous records identifying the names of victims of sexual assault and their families. Pursuant to G.L. c. 265, § 24C, the portion of the records of a court which contains the name of the victim in an arrest, investigation, or complaint for rape or assault with intent to rape in certain specified offenses, shall be withheld from public inspection, except with the consent of a justice of such court where the complaint is or would be prosecuted. Under section 24C, except as otherwise provided, it shall be unlawful to publish, disseminate or otherwise disclose the name of any individual identified as a victim of the specified offenses. The public may contact the Sex Offender Registry Board and the Department of Criminal

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

Justice Information Services for information regarding sex offenders and persons with a criminal history.

Rule 5(a)(1)(i)(B), Address of Self-represented Litigants. The current mailing addresses for all attorneys or self-represented litigants is required to allow parties and the court to promptly and effectively serve notice, filings, and decisions on all necessary parties. Self-represented litigants may provide a “preferred” address, such as a United States post office box number, if they do not want their home address viewable on the Trial Court’s Internet Portal.

Rule 5(a)(2), Criminal Cases. All criminal case types not exempted by statute, rule, court order, standing order, or determination of the Chief Justice of the Trial Court shall be made available on the Internet Portal. However, as a matter of policy, the committee has determined that criminal case searches will be limited to case number. Therefore, search by defendant name shall not be permitted on the Internet Portal for criminal cases.

Each court should provide in the Clerk’s office a kiosk for the public to use to view court records of criminal cases that are not otherwise prohibited from public disclosure. Searches of court records on the court kiosk will not be limited to case number.

The Criminal Offender Record Information (CORI) statute, G.L. c. 6, §§ 167-178B (CORI) governs the dissemination of criminal offender record information. The legislative history to the 2010 amendments to the CORI statute provides that the intent was to strike “a great balance . . . between providing information that the public has a right to know and protecting people's privacy.” State House News Service, Nov. 18, 2009 (statement of Sen. Creem on Senate Doc. No. 2210). If the Trial Court were to provide the public with the ability to remotely search criminal cases by a defendant's last name, which could essentially reveal a defendant’s entire criminal history, it could thwart the careful balance between access and privacy struck by the Legislature in enacting the CORI statute.

The 2010 CORI reform enacted by the Legislature includes enhanced online access to a record subject’s criminal history record and expanded the group of people who could receive this information. G. L. c. 6 § 172(a); see generally Gregory I. Massing, “CORI Reform Providing Ex-Offenders with Increased Opportunities Without Compromising Employers' Needs”, 55 Boston B.J., no. 1, 2011, at 21, 22, 24. However, the Legislature also gave record subjects the ability, free of charge, to obtain a list of everyone, other than a criminal justice agency, who has accessed their CORI. *Id.* at 21, 24. This provides a check on CORI access and usage. The CORI law also provides for review and issuance of penalties for improper usage of CORI information. G.L. c. 6, § 178 1/2. Given these numerous protections and limitations, the Legislature instituted a system that included accountability for CORI access and use. Such limitations and accountability could not reasonably be maintained if a defendant’s criminal history could be pieced together through a search on the Trial Court’s website. For members of the

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

public seeking a criminal offender record on an individual, the Department of Criminal Justice Information Services (“DCJIS”) has created a website (“iCORI”) for registered users to request and obtain criminal offender record information. See 803 Code Mass. Regs. § 2.00 et seq.

Further, allowing remote access to court records in certain criminal cases implicates the concerns identified by the Supreme Judicial Court in Commonwealth v. Pon, 469 Mass. 296, 307 (2014), namely that access to criminal records negatively affects a defendant’s future employment prospects, which, in turn, makes rehabilitation more difficult. The Court’s decision in Pon was limited to closed criminal proceedings that resulted in a dismissal or an entry of nolle prosequi and also possibly to acquittals and findings of no probable cause. Id. at 316 & n. 24. All of these would be viewable on the Trial Court’s Internet portal; such access runs against the specific concerns enunciated in Pon. For court records not implicated in Pon, there is nonetheless a concern that permitting a broad criminal record search through the Internet Portal would frustrate the privacy and rehabilitation concerns identified and protected by the Legislature and Supreme Judicial Court.

The committee concluded that allowing the public to view the progress and resolution of individual proceedings by case number allows for “the contemporaneous review [of judicial proceedings] in the forum of public opinion,” Commonwealth v. Cohen, 456 Mass. 94, 106 (2010), quoting In re Oliver, 333 U.S. 257, 270 (1948), without allowing for criminal offender record information to be easily assembled from the Internet Portal. Public access to criminal records and proceedings in the courthouse shall not be affected or limited by this rule.

Rule 5(b), Access through the Attorney Portal. Attorneys shall have no greater access to court records than the general public except for those cases in which they have entered an appearance. The Attorney Portal is intended as a convenience for attorneys to easily access their calendar and cases. The ability to conduct a general search for court records not connected to an attorney’s cases will be available only on the Internet Portal, pursuant to Rule 5(a).

Access to the Attorney Portal should be available to both attorneys licensed in Massachusetts and attorneys licensed in other jurisdictions who enter an appearance pro hac vice and have complied with S.J.C. Rule 3:15.

Exempted Case Types. When feasible, otherwise exempted cases should be available for attorneys who have entered an appearance in that case to view through the Attorney Portal. However, impounded cases will not be available through the Attorney Portal. Each appropriate Department of the Trial Court may request permission from the Chief Justice of the Trial Court to exempt certain criminal case types or categories of information from remote access.

Remote Accessibility of Case Documents through the Attorney Portal. Electronic access to portable electronic documents (PDFs) stored in the court’s document

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

management system may be through the Attorney Portal. The Chief Justice of the Trial Court may determine which documents and case types will be available through the Attorney Portal. Otherwise accessible documents may be restricted by the court if they include personal identifying information not redacted pursuant to [proposed] S.J.C. Rule1:24.

Audio and video recordings. Audio and video recordings maintained by the Clerk shall not be remotely accessible at this time. The public may request a recording directly from the Clerk.

Rule 5(c), Nonparty Information. Information that specifically identifies an individual who is a witness in a criminal case, victim to a criminal or delinquent act, or juror shall not be stated in the caption of a filing. This subsection is intended to protect the privacy and safety of persons who are not litigants. Docket entries should not be created that use the full name of such individuals, for instance in conjunction with the title of a motion or notice relating to that person, except when required by law.

Rule 5(d), Availability of Additional Records. This subsection permits the Chief Justice of the Trial Court to determine that additional electronic court records may be made remotely accessible to the public, which may include expanded availability of PDFs.

Rule 5(e), No Creation of Rights. The public has a qualified common law right to access court records in a courthouse. Although there is no constitutional or common law right to remote access of the same court records, the Trial Court recognizes that advances in technology provide the public and the court with additional means of access that benefit both the public and the court. This rule acknowledges the desirability of providing remote access to court information, and balances that access with the limits imposed by law and privacy concerns. Rule 5 does not provide the public a right of access to any court record prohibited from public disclosure (see Addendum A, “Records Excluded From Public Access”), nor to the provision of remote access to all content of publicly available court records. The right of the public to access to court records at a Clerk’s office pursuant to Rule 2 shall not be limited because of concurrent remote access.

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

RULE 6. CORRECTION OF CLERICAL ERROR IN ELECTRONIC DOCKET ENTRY

Any party, nonparty, or their attorney may make a written request to correct a clerical error in an electronic docket. Such a request must be made using a form that can be found online at masscourts.org or at any Clerk's office. The completed form must be submitted to the Clerk's office where the court record in question is physically located and to all parties.

NOTE

This Rule is intended to allow parties and nonparties to alert the Clerk to a potential clerical mistake or error, but does not apply to the correction of errors of substance. For further process see Mass. R. Civ. Pro. 60 and Mass. R. Crim. Pro. 42.

ADDENDUM: RECORDS EXCLUDED FROM PUBLIC ACCESS

**MASSACHUSETTS COURT SYSTEM
LIST OF AUTHORITIES DESIGNATING
MATERIAL AS IMPOUNDED, CONFIDENTIAL,
OR NOT AVAILABLE FOR PUBLIC INSPECTION (December 2015)**

The following list is an overview of the material that a statute, court rule, or standing order designates must be withheld as “impounded,” “withheld from public inspection,” “not available for public inspection,” “confidential,” “segregated,” or “sealed.” The list is not an exhaustive compilation of such matters under Massachusetts law. Attorneys and self-represented litigants must conduct their own research prior to filing any papers to ensure full compliance with the law governing impoundment.

Abortion consent forms and materials ("Mary Moe" materials). “The said consent form and any other forms, transcript of evidence, or written findings and conclusions of a court, shall be confidential and may not be released to any person except by the pregnant woman's written informed consent or by a proper judicial order, other than to the pregnant woman herself, to whom such documents relate, the operating physician, or any person whose consent is required pursuant to this section, or under the law.” (G.L. c. 112, § 12S)

Abuse Prevention Orders. If the plaintiff or defendant is a minor in an action arising under G.L. c. 209A, the records “shall be withheld from public inspection except by order of the court; provided, that such records shall be open, at all reasonable times, to the inspection of the minor, said minor’s parent, guardian, attorney, and to the plaintiff and the plaintiff’s attorney, or any of them.” (G.L. c. 209A, § 8) The plaintiff’s residential address, residential telephone number and workplace name, address, and telephone number “shall be confidential and withheld from public inspection” when pursuing an action under c. 209A. (G.L. c. 209A, § 8)

Address Confidentiality Program Affidavits. Affidavits giving the actual address of litigants who wish to employ in civil litigation the post office box address that has been assigned to them by the Secretary of State’s Address Confidentiality Program. (S.J.C. Rule 1:20) The actual address of the program participant may be used by court personnel in the furtherance of their official duties, but such address shall not be used for purposes of mailing any documents, notices or orders. The affidavit shall be impounded by operation of this rule without any further judicial action. The Clerk shall segregate the impounded affidavit from the other papers and shall not make the information contained therein available to other parties. (G.L. c. 9A; 950 Code Mass. Regs. § 130)

Adoptions. “All petitions for adoption, all reports submitted there under and all pleadings, papers or documents filed in connection therewith, docket entries in the permanent docket and record books shall not be available for inspection, unless a judge of probate of the county where such records are kept, for good cause shown, shall otherwise order.” (G.L. c. 210, § 5C)

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

Affidavits of Indigency. “[B]y order of the Supreme Judicial Court, as required by G.L. c. 261, § 27B, the financial information contained in an affidavit of indigency, pursuant to both G.L. c. 261, § 29 (inmate), and G.L. c. 261, § 27B (non-inmate), may not, except by order of the recipient court, be disclosed to anyone other than authorized court personnel, the applicant, the applicant’s counsel or anyone authorized in writing by the applicant.” *Kordis v. Superintendent, Souza Baronowski Correctional Ctr.*, 58 Mass. App. Ct. 902, 904 (2003). The affidavit of indigency form states that, “[b]y order of the Supreme Judicial Court, all information in this affidavit is CONFIDENTIAL. Except by special order of a court, it shall not be disclosed to anyone other than authorized court personnel, the applicant, applicant's counsel or anyone authorized in writing by the applicant.”

Alcohol and drug abuse program and treatment records. A party’s release form and/or court order may be needed to access records. (42 U.S.C. § 1175, 290 dd-3)

Appeals from the Sex Offender Registry Board. “The court shall keep proceedings conducted pursuant to this paragraph and records from such proceedings confidential and such proceedings and records shall be impounded.” (G.L. c. 6, § 178M)

Board of Bar Overseers proceedings. “Except as the Court shall otherwise order or as otherwise provided in this rule, the Board and the Bar Counsel shall keep confidential all information involving allegations of misconduct by a lawyer and all information that a lawyer’s physical or mental condition may adversely affect his or her ability to practice law until the occurrence” of an enumerated event. (S.J.C. Rule 4:01, § 20(1))

Child Protection Orders. Any protection of children proceeding conducted pursuant to G.L. c. 119, § 1 to § 37 cannot be open to the general public and the name of the individual involved cannot be published. (G.L. c. 119, § 38)

Child in Need of Services/Child Requiring Assistance. Petitions seeking a determination that a child is in need of services or requiring assistance shall be confidential and not open to the public. (G.L. c. 119, § 39E to § 39I)

Commission on Judicial Conduct proceedings. “Except as provided in this section, all proceedings of the commission shall be confidential until there has been a determination of sufficient cause and formal charges have been filed with the supreme judicial court.” (G.L. c. 211C, § 6)

Delinquency Proceedings. “The record of a youthful offender proceeding conducted pursuant to an indictment shall be open to public inspection in the same manner and to the same extent as adult criminal records. All other record of the court in cases of delinquency arising under sections fifty-two to fifty-nine, inclusive, shall be withheld from public inspection except with the consent of a justice of such court; provided however, that such records shall be open, at all reasonable times, to inspection by the child proceeded against” (G.L. c. 119, § 60A)

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

Department of Workforce Development Hearings (unemployment hearings).

All information “secured pursuant to this chapter is confidential and for the exclusive use and information of the department in the discharge of its duties. Such information is not a public record nor admissible in any action or proceeding, except as provided in this section. This information is absolutely privileged and shall not be made the subject matter or basis in any action of slander, libel or emotional distress.” (G.L. c. 151A, § 46)

Expunged Records. See Commonwealth v. S.M.F., 40 Mass. App. Ct. 42, 43-45 (1996) (in certain circumstances where the sealing statutes are not applicable, a trial court may use its inherent judicial power to order expungement); Commissioner of Probation v. Adams, 65 Mass. App. Ct. 725 (2006) (expungement of 209A orders permissible where the order was obtained through fraud on the court).

Financial statements. Statements submitted by parties in the Probate and Family Court shall be impounded or kept separate from other papers in the case and shall not be available for public inspection, but shall be available to the courts, the attorneys (whose appearances are entered in the case), the parties to the case, the registers, assistant registers, members of the Probation Department of the Probate Courts and to employees of the Massachusetts Department of Revenue, where necessary. (Supplemental Probate and Family Court Rule 401(d)).

Grand Jury minutes or documents. “Any grand jury transcript or document citing or describing grand jury testimony filed with any court shall be filed and maintained under seal, unless the paper is filed in a criminal prosecution for perjury before a grand jury.” (G.L. c. 268, § 13D(e))

Guardian ad Litem Reports. “Unless otherwise ordered by the court, all guardian ad litem reports except those filed in cases involving accounts, licenses to sell and estate plans are impounded.” (Probate and Family Court Standing Order 2-08)

Harassment Prevention Orders. The records of cases arising out of actions in which the plaintiff or defendant is a minor shall be withheld from public inspection except by order of the court; provided, however, that such records shall be open, at all reasonable times, to the inspection of the minor, such minor’s parent, guardian and attorney and to the plaintiff and the plaintiff’s attorney. The plaintiff’s residential address, residential telephone number and workplace name, address, and telephone number, contained within the court records shall also be withheld with the same exception. All confidential portions of the records shall be accessible at all reasonable times to the plaintiff and plaintiff’s attorney, to others specifically authorized by the plaintiff to obtain such information and to prosecutors, victim-witness advocates as defined in section 1 of chapter 258B, sexual assault counselors as defined in section 20J of chapter 233 and law officers, if such access is necessary in the performance of their duties. (G.L. c. 258E, § 10)

Inquest Report and Transcript. See G.L. c. 38, § 10; In re Globe Newspaper Co., Inc., 461 Mass. 113 (2011).

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

Juror Questionnaires. Jurors' confidential questionnaires or criminal records are not public records. (G.L. c. 234A, §§ 23, 33)

Juvenile Trials. Juvenile trials must exclude the public. Courts shall designate a juvenile session with a separate docket and record for the hearing of cases of children under eighteen years of age. The session shall be separate from that for the trial of criminal cases. The court shall exclude the general public from juvenile sessions admitting only such persons as may have a direct interest in the case, except in cases where the Commonwealth has proceeded by indictment. (G.L. c. 119, §§ 52, 60A, 65; G.L. c. 276, § 100B). However, records of adults prosecuted for criminal offenses in the Juvenile Court shall be open to the public.

Mediator Records. "All memoranda, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes." (G.L. c. 233, § 23C)

Medical Certificates and Clinical Team Reports. These reports must be filed when seeking temporary guardianship on the grounds of mental illness or physical incapacity or for conservatorship on the grounds of mental weakness. These reports are impounded, held separate from the file, and not available for public inspection. Access to inspect the reports is limited to the court, attorneys of record, parties, guardians ad litem, and any probation officer assigned to the case. The order specifically prohibits use for any purpose other than consideration of the petition. The certificate, by the terms of this standing order, is substituted for records that are protected by the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-19 1 ("HIPAA") and would require a release form from the person over whom guardianship is sought by the petition. (Probate and Family Court Standing Order 5-08)

Medical, Health, and Hospital Records. A party's release form or court order is needed to access records. G.L. c. 111, §§ 70, 70E(b). HIPAA health providers may release personal health information only if the release signed by a party complies with the provisions of the federal law. Even if no statutory privilege applies to the information sought, the provider or keeper of other records (e.g., unlicensed support group leaders, batterer intervention programs) may also request a written release from their client.

Mental Health Reports. Mental health examination and commitment records (G.L. c. 123, §§ 1-18, 35), other than ordinary entries on the criminal docket, except on a judge's order.

Medical Peer Review Committee. "Except as otherwise provided in this section, the proceedings, reports and records of a medical peer review committee shall be

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

confidential and shall be exempt from the disclosure of public records under G.L. c. 66, § 10 but shall not be subject to subpoena or discovery, or introduced into evidence, in any judicial or administrative proceeding.” (G.L. c. 111, § 204)

Non-Adjudication of Party as Father. “In an action to establish paternity or in which paternity of a child is an issue, all complaints, pleadings, papers, documents or reports filed in connection therewith, docket entries in the permanent docket and record books shall be segregated and unavailable for inspection only if the judge of the court where such records are kept, for good cause shown, so orders or the person alleged to be the father is adjudicated not to be the father of the child; provided, however, that the child, the child’s mother, the person adjudicated to be the father and the department of transitional assistance, the department of children and families, the division of medical assistance or any other public assistance program and the IV-D agency as set forth in chapter 119A, when the child who is or was the subject of the complaint is a recipient of public assistance of the attorney for any of them, and the department of children and families, when the child who is or was the subject of the complaint is within the care and protection of the department of children and families, is the subject of a petition for such care of protection pursuant to chapter 119 or is the subject of a petition to dispense with consent for adoption pursuant to subsection (b) of section 3 of chapter 210, shall have access to and the right to obtain copies of the papers, docket books and judgments in actions pursuant to this chapter.” (G.L. c. 209C, § 13)

Pending or Denied Criminal Complaint Applications. Alphabetical indices, dockets, contents of case files, exhibits put in evidence, and tape recordings (if any) of proceedings should presumptively be closed to the public unless the Clerk-magistrate or a judge concludes that the legitimate interest of the public outweighs the privacy interests of the accused. District Court Standards of Judicial Practice, The Complaint Procedure §§ 3:15 and 5:02 (rev. 2008).

Personal Medical Information. See Probate and Family Court Standing Order 1-09, Article V of G.L. c. 190B.

Photographs of unsuspecting nude person. “A photograph, videotape or other recorded visual image, depicting a person who is nude or partially nude that is part of any court record arising from a prosecution under this section, shall not be open to public inspection and shall only be made available by court personnel to a law enforcement officer, prosecuting attorney, defendant's attorney, defendant, or victim connected to such prosecution for inspection, unless otherwise ordered by the court.” (G.L. c. 272, § 105(g))

Presentence Probation Reports. “In extraordinary cases, the judge may except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.” See Mass. R. Crim. P. 28(d)(3); Commonwealth v. Martin, 355 Mass 296 (1969).

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

Probation Records. The information obtained and recorded shall not be regarded as public records and shall not be open for public inspection but shall be accessible to the justices and probation officers of the courts, to the police commissioner for the city of Boston, to all chiefs of police and city marshals, and to such departments of the state and local governments as the commissioner may determine. (G.L. c. 276, § 100)

Psychotherapist Treatment Records. See G.L. c. 112, § 129A, except as provided by G.L. c. 233, § 20(b).

Qualified Domestic Relation Orders. These reports are impounded, held separate from the file, and not available for public inspection. Access to inspect the reports is limited to the court, attorneys of record, and parties. (Probate and Family Court Standing Order 3-08)

Records deposited with the Clerk-magistrate as potential exhibits. Materials that are not yet introduced in evidence or filed as an attachment to a pleading or motion, including business records produced pursuant to G.L. c. 233, § 79J, hospital records produced pursuant to G.L. c. 233, § 79, and records produced pursuant to the protocol of Commonwealth v. Dwyer, 448 Mass. 122, 148-149 (2006).

Records and hearings related to court-ordered examinations in criminal proceedings. An examiner designated by the court for a court-ordered examination in a criminal proceeding may request records by filing a request with the court stating the records requested and the reason for the request. The defendant shall file objections to the production of the requested material and the judge may hold an ex parte hearing on those objection. "Records of such hearing shall be sealed until the report of the examiner is disclosed to the parties under Rule 14(b)(2)(B)(iii)." If a record request is granted, the files are subpoenaed by the Clerk and are kept under seal except as otherwise provided by rule. (Mass. R. Crim. P. 14(b)(2)(C)(iii))

Rights afforded victims, witnesses, or family members. "To provide victims a meaningful role in the criminal justice system, victims and witnesses of crime, or in the event the victim is deceased, the family members of the victim, shall be afforded the following basic and fundamental rights, to the greatest extent possible and subject to appropriation and to available resources, with priority for services to be provided to victims of crimes against the person and crimes where physical injury to a person results:

* * * *

(h) for victims and witnesses, to be informed of the right to request confidentiality in the criminal justice system. Upon the court's approval of such request, no law enforcement agency, prosecutor, defense counsel, or parole, probation or corrections official may disclose or state in open court, except among themselves, the residential address, telephone number, or place of employment or school of the victim, a victim's family member, or a witness, except as otherwise ordered by the court. The court may enter such other orders or conditions to maintain limited disclosure of the

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

information as it deems appropriate to protect the privacy and safety of victims, victims' family members and witnesses;" (G.L. c. 258B, § 3(h))

Sealed Records. Records that have been properly sealed by a justice or by statute or the commissioner of probation, or in conjunction with a pardon granted by the Governor of the Commonwealth. See G.L. c. 276, §§ 100A, 100B and 100C.

School records. A party who has shared or sole legal custody may authorize release of records, except for a parent or party whose access is restricted by a Chapter 209A or other court order. (G.L. c. 71, § 34H; G.L. c. 208, § 31)

Search Warrants. Between issuance and return, a search warrant, the application for search warrant, and any supporting affidavits are not publically available. (G.L. c. 276, § 2B)

Social Worker records. "All communications between a social worker licensed pursuant to the provisions of § 132 or a social worker employed in a state, county or municipal governmental agency, and a client are confidential." (G.L. c. 112, § 135A)

Trade secrets and other matters in connection with discovery. "Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county or judicial district, as the case may be, where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way" (Mass. R. Civ. P. 26(c)(7))

Victim's Name in Sexual Assault Record. The portion of the records of a court or any police department which contains the name of the victim in an arrest, investigation, or complaint for rape or assault with intent to rape in certain specified offenses, shall be withheld from public inspection, except with the consent of a justice of such court where the complaint is or would be prosecuted. Except as otherwise provided it shall be unlawful to publish, disseminate or otherwise disclose the name of any individual identified as an alleged victim of the specified offenses. (G.L. c. 265, § 24C). The sexual assault offenses referenced in § 24C include:

- Indecent assault and battery on a child under age 14 (G.L. c. 265, § 13B)
- Indecent assault and battery on a child under 14 during commission of certain offenses or by mandated reporters (G.L. c. 265, § 13B¹/₂)
- Indecent assault and battery on a child under 14 by certain previously convicted offenders (G.L. c. 265, § 13B³/₄)
- Rape or aggravated rape (G.L. c. 265, § 22)
- Forcible rape of a child (G.L. c. 265, § 22A)
- Rape of a child during commission of certain offenses or by force (G.L. c. 265, § 22B)

PROPOSED UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

- Rape of a child through use of force by certain previously convicted offenders (G.L. c. 265, § 22C)
- Statutory rape (G.L. c. 265, § 23)
- Rape and abuse of a child aggravated by age difference between defendant and victim or by mandated reporters (G.L. c. 265, § 23A)
- Rape and abuse by certain previously convicted offenders (G.L. c. 265, § 23B)
- Assault with intent to rape (G.L. c. 265, § 24)
- Assault on a child under 16 with intent to commit rape (G.L. c. 265, § 24B)
- Trafficking of persons (G.L. c. 265, § 50)

Victim program locations. Locations of battered women's shelters, domestic violence, and rape crisis programs may not be disclosed by court order, or otherwise. (G.L. c. 233, §§ 20J, 20K)