Lynda M. Connolly
Chief Justice

Trial Court of the Commonwealth
District Court Department

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M E M O R A N D U M

TO: District Court Judges, Clerk-Magistrates and Chief Probation Officers
FROM: Hon. Lynda M. Connolly, Chief Justice
DATE: August 26, 2010
SUBJECT: *Legal Matters*

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Many of the items in this transmittal relate directly to judges in the conduct of their work on the bench, but I commend them to everyone's attention.

1. **Instructing jurors not to use personal communication devices.** Judges should be familiar with the Trial Court's new Policy on Juror Use of Personal Communication Devices (March 26, 2010). In addition to the usual jury instructions that jurors are not to discuss the case with others or to read or listen to news reports about the case, judges in jury sessions must now caution all seated jurors:

- that jurors may not use a computer, cellular phone, or other electronic device with communication capabilities, including internet access, while at trial or during jury deliberations. These devices may be used during lunch breaks but may not be used to obtain or disclose information about, or relevant to, the case; and

- that jurors may not use a computer, cellular phone, or other electronic device with communication capabilities, including internet access, or any other methods to obtain or disclose information about, or relevant to, the case when they are not in court.

Judges who greet jury pools each morning must also instruct them about this policy.

The full text of the policy is available in the Judges area of the District Court intranet site, and also on the internet at http://www.jud.state.ma.us/cjam-policy-juror-use-personal-devices.html.

The District Court Committee on Criminal Proceedings will shortly be publishing a modified model jury instructions with these additions. You may also find suggested language from the U.S. Judicial Conference at http://www.wired.com/images_blogs/threatlevel/2010/02/juryinstructions.pdf and from the New York State courts at http://www.nycourts.gov/cji/1-General/CJI2d.Jury_Admonitions.pdf.

2. **Correction to model jury instruction on subsequent offenses.** *Commonwealth v. McMullin*, 76 Mass. App. Ct. 904 (2010), requires a change in our Model Jury Instruction 2.540 on "Subsequent Offenses." Consistent with prior case law, the current instruction (available in the Criminal area of the District Court's intranet and internet sites) requires the Commonwealth to prove that the defendant was represented by, or had waived, counsel on the prior conviction. However, in *McMullin* the Appeals Court noted that in more recent cases the Supreme Judicial Court has determined in analogous situations that a defendant is generally presumed to have had or waived counsel on prior convictions, and the Commonwealth need not come forward with proof on the point unless the defendant first makes a showing that the conviction was obtained without representation by (or waiver of) counsel. *McMullin* held that the more recent approach should also be applied in the trial of subsequent offenses as well. The Supreme Judicial Court denied further appellate review in *McMullin* on June 18.

When proving a prior offense, the Commonwealth is no longer required to prove that the defendant was represented by (or waived) counsel unless the defendant first makes a showing that the conviction was obtained without such representation or waiver of counsel. Our Committee on Criminal Proceedings will be publishing a modified Model Jury Instruction 2.540 shortly. Until then, please remember to make the necessary change in your jury instructions.

3. **Revised breath test regulations.** As you were informed in a recent Legal Update Bulletin, the Office of Alcohol Testing (OAT) has issued revised regulations governing breath tests, effective April 30, 2010. These were promulgated at 1155 Mass. Register 77 and are codified at 501 Code Mass. Regs. § 2.00. General Laws c. 90, § 24K provides that a breath test given to a person charged with a G.L. c. 90 offense is valid only if done in accordance with such regulations.

The main substantive changes from the prior regulations are:

- ***Permissible machines.*** The definition of permissible "breath test devices" has been expanded beyond Breathalyzers and Simulators to encompass any other technology "capable of quantifying the amount of alcohol in a breath sample or calibration standard" and compliant with § 24K (501 CMR 2.02).

- ***Calibration standard.*** OAT furnishes police departments with a sample that has a known alcohol concentration and is used to confirm the calibration of breath test devices. Formerly called the "testing solution" or "certified alcohol standard," it has been renamed the "calibration standard" and may now be in either liquid or dry gas form (501 CMR 2.02). A *liquid calibration standard* has an alcohol concentration of 0.155% ± .005% at 34˚ C. A *gas calibration standard* has an alcohol concentration of 0.080% ± .005%. (501 CMR 2.11.)

- ***Calibration standard analysis.*** A breath test device is operating properly if: (1) a calibration standard analysis using a *liquid calibration standard* shows an alcohol concentration of 0.140%–0.169%, with results truncated to no less than two decimal places, or (2) a calibration standard analysis using a *gas calibration standard* shows an alcohol concentration of 0.074%–0.086%, with results truncated to three decimal places (501 CMR 2.11).

- ***Periodic testing of the machine.*** The prior regulations provided that the calibration standard analysis done as part of every breath test also served as a periodic test of the breath test device itself. The revised regulations have eliminated that provision, and now require that the device itself must be tested, by conducting a sequence consisting of 5 tests of the calibration standard, only: (1) when the calibration standard is replaced, and (2) after the breath test device is certified annually by OAT. A report created at the end of a valid periodic test and showing the results "shall serve as the record that the device is in calibration and working properly, and shall be admissible in a court of law." (501 CMR 2.12.)

- ***15-minute observation period***. Both the prior and the revised regulations require the breath test operator to observe an arrestee for at least 15 minutes before administering a breath test. The revised regulations additionally require the operator to restart the 15-minute observation period if the operator "has reason to believe the arrestee has introduced any item into his or her mouth" or if "during the test sequence, the breath test device reports the presence of mouth alcohol" (201 CMR 2.13[3]). In *Commonwealth v. Pierre,* 72 Mass. App. Ct. 230 (2008), the Appeals Court declined to decide whether, in order to show compliance with such a requirement, a breath test operator would have to include in his or her trial testimony mention of whether or not such a contaminating event had occurred.

- ***More than 2 breath samples eliminated.*** The former regulations engendered some uncertainty as to how to instruct the jury if more than two breath samples were needed to

obtain two "adequate breath samples," i.e., two that were within the permitted ± 0.02 range of each other. (For a discussion of this issue, see the notes to District Court Model Jury Instruction 5.300, supplemental instructions 2 and 3.) The revised regulation apparently eliminates this problem by providing that if the required sequence (one adequate breath sample analysis, one calibration standard analysis, and a second adequate breath sample analysis) "does not result in [two] breath samples that are within ± 0.02 blood alcohol content units, a new breath test sequence shall begin" (201 CMR 2.14[4]).

The text of revised 201 Code Mass. Regs. § 2.00 is included in the "OUI Statute and Regulations" posted in the Criminal area of the District Court intranet site at http://trialcourtweb/courtsandjudges/courts/districtcourt/oui_related_statutes_regulations.pdf.

In light of the changed regulations, the Committee on Criminal Proceedings will shortly publish an amended supplemental instruction 3 to Model Jury Instruction 5.300.

4. **Jury waiver need not be in writing for guilty plea.** In *Commonwealth v. Hubbard,* 457 Mass. 24 (2010), the Supreme Judicial Court held that "[t]here is no requirement that, when accepting a defendant's tender of a guilty plea, a defendant's waiver of the right to a trial with or without a jury be in writing." *Id.* at 26. The court found that the requirement of a written jury waiver in G.L. c. 263, § 6 and Mass. R. Crim. P. 19(a) applies only to bench trials, not to guilty pleas.

The opinion cautions that this does not change the requirement that "the judge, before accepting the tender of a guilty plea, is obligated to conduct a colloquy in court that informs a defendant about the consequences of entering a guilty plea, including a warning that by pleading guilty, a defendant is waiving 'the right to trial with or without a jury' [Mass. R. Crim. P. 12(c)(3)(A)]. No more is required, for no trial is to take place . . . ." *Id.* The court also noted that the pleading defendant "need not be informed of the differences between a trial before a jury and a trial before a judge. This is because, on acceptance of a guilty plea, there will be no trial." 457 Mass. at 25 at n. 4.

The absence of a written jury waiver further emphasizes the importance of the guilty plea colloquy, and underscores the wisdom of routinely utilizing a model colloquy or checklist such as that suggested by our Criminal Proceedings Committee, which is available in the Judges area of our intranet site at http://trialcourtweb/courtsandjudges/courts/districtcourt/modelcolloquies.pdf. Also, the back of the "green sheet" (reproduced in the Forms area of our intranet and internet sites) can serve as a checklist for an adequate colloquy.

5. **New legislation on texting and cellphone use while driving.** Statute 2010, c. 155 (effective September 30, 2010) forbids drivers to send or read e-mail or text messages in a moving motor vehicle (G.L. c. 90, § 13B). It also bans all mobile phone use by drivers under 18 (§ 8M) and by operators of public transport vehicles (§ 12A) but permits other adult drivers to use a mobile phone "as long as 1 hand remains on the steering wheel at all times" (§ 13).

The new legislation also extends the negligent operation statute (§ 24[2][a]) to encompass a driver who, "while operating a motor vehicle in violation of [one of the above sections] . . . is the

proximate cause of injury to any other person, vehicle or property by operating said motor vehicle negligently so that the lives or safety of the public might be endangered."

The new statute is available at http://www.mass.gov/legis/laws/seslaw10/sl100155.htm. Please note that these changes are not effective until September 30, 2010. The following 6 offense codes have been added to MassCourts to accommodate them. (Those marked with an asterisk are civil motor vehicle infractions; the others are criminal offenses.)

90/8M	**MOBILE PHONE, OPERATOR UNDER 18 USE *** c90 §8M
90/12A/A	**MOBILE PHONE, PUBLIC TRANSPORT MV OPERATOR USE** * c90 §12A(a)
90/12A/B	**MOBILE PHONE, PUBLIC TRANSPORT NON-MV OPERATOR USE** c90 §12A(a)
90/13/H	**MOBILE PHONE, OPERATOR USE IMPROPERLY *** c90 §13
90/13B	**ELECTRONIC MESSAGE, OPERATOR SEND/READ *** c90 §13B
90/24/W	**NEGLIGENT OPERATION & INJURY FROM MOBILE PHONE USE** c90 §24(2)(a)

Clerks' offices should note that the offense of using a mobile phone while operating a vehicle or vessel being used in public transportation has been bifurcated into two offense codes, depending on whether a motor vehicle (90/12A/A) or a non-motor vehicle (90/12A/B) was involved. Offense code 90/12A/A should be used if the violator was operating a bus or other motor vehicle, since such violations are CMVIs which must be reported to the RMV. Offense code 90/12A/B should be used if the violator was operating a train, ferry, water shuttle or other non-motor vehicle in public transportation, since that is a misdemeanor and not a motor vehicle violation which must be reported to the RMV.

6. **G.L. c. 123, § 35 extended to chronic inhalent abusers.** General Laws c. 123, § 35, which provides for the involuntary commitment of alcoholics and substance abusers, will be amended by St. 2010, c. 292 (effective November 8, 2010) to expand the definition of "substance abuser" to include someone who "intentionally inhales toxic vapors." We are preparing an amended version of the "Petition for Commitment" form for § 35 cases, which will be available in the Forms area of our intranet and internet websites shortly.

7. **Federal protections for residential tenants in foreclosed properties.** In Trans. 1051 (August 11, 2010) I outlined the new restrictions against eviction of residential tenants from foreclosed properties which were recently enacted by the Massachusetts Legislature (G.L. c. 186A, added by St. 2010, c. 258). The Massachusetts Law Reform Institute has brought to my attention that there is also Federal law on the same subject, the Protecting Tenants at Foreclosure Act of 2009, which was recently amended and extended through 2014. MLRI summarizes the relevant parts of the Federal law as follows:

> "On May 20, 2009, the President signed the 'Protecting Tenants at Foreclosure Act of 2009' (PTFA), providing certain protections for tenants in foreclosed properties. Under Sections 702-704 of PTFA, an 'immediate successor in interest' to a foreclosed property must give 'bona fide' tenants at least 90 days' notice to vacate. Tenants who enter into leases before a 'notice of foreclosure' are, with certain exceptions, entitled to remain in possession for the remainder of their leases, and additional protections are accorded to Section 8 tenants. PTFA was originally set to expire on December 31, 2012.[1]

"On July 21, 2010, the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (HR 4173). Section 1484 of the Act, 'Protecting Tenants at Foreclosure Extension and Clarification,' amends and clarifies PTFA in two ways: first, it extends the sunset date from December 31, 2012 to December 31, 2014; second, it clarifies that the date of a 'notice of foreclosure' is 'the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.'[2]

"PTFA, as amended and clarified in the Dodd-Frank bill, is cited as 12 U.S.C. § 5220 note; Pub. L. No. 111-22, tit. VII, § 702, 123 Stat. 1632, 1660-62 (2009), as amended by Pub. L. No. 111-203, tit. XIV, § 1484 (2010).

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[1] "As passed in 2009, PTFA (Pub. L. 111–22, div. A, title VII, § 702, May 20, 2009, 123 Stat.1660) provides:

"(a) In General.—In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title [May 20, 2009], any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to—

"(1) the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and

"(2) the rights of any bona fide tenant, as of the date of such notice of foreclosure—

"(A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1); or

"(B) without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90 day notice under subsection (1), except that nothing under this section shall affect the requirements for termination of any Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.

"(b) Bona Fide Lease or Tenancy.—For purposes of this section, a lease or tenancy shall be considered bona fide only if—

"(1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;

"(2) the lease or tenancy was the result of an arms-length transaction; and

"(3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.

"(c) Definition.—For purposes of this section, the term 'federally-related mortgage loan' has the same meaning as in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602)."

[2] "Section § 1484 of the Dodd-Frank bill provides:

"The Protecting Tenants at Foreclosure Act is amended—

"(1) in section 702 (12 U.S.C. 5220 note)—

"(A) in subsection (a)(2), by striking ', as of the date of such notice of foreclosure'; and (B) in subsection (c), by inserting after the period the following: 'For purposes of this section, the date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.'; and

"(2) In section 704 (12 U.S.C. 5201 note), by striking '2012.' and inserting '2014.'."

I am grateful to MLRI for pointing out this additional source of tenant protections.

8. **Checklist for extending Chapter 209A orders.** Attached to this transmittal is a checklist and a synopsis of the relevant criteria for extending G.L. c. 209A abuse prevention orders, which judges may find useful on the bench. It reworks materials on *Iamele v. Asselin*, 444 Mass. 734 (2005), that were developed by the District Court Professional Development Group on Domestic Abuse and have

been previously distributed at various presentations. Thanks to the members of the Professional Development Group for their ongoing assistance in staying current in this important area.

9. **Personnel matters.** I am pleased to welcome seven new judges to the District Court bench: Honorable Timothy M. Bibaud (East Brookfield), Honorable J. Elizabeth Cremens (Woburn), Honorable Franco J. Gobourne (Circuit), Honorable Antoinette E. McLean Leoney (Circuit), Honorable Janet J. McGuiggan (Worcester), Honorable Bethzaida Sanabria-Vega (Holyoke), and Honorable Debra Shopteese (Circuit).

Judge Bibaud is a graduate of the College of the Holy Cross and New England School of Law. For most of his 22-year legal career he practiced in the Worcester District Attorney's Office as a trial attorney and as supervisor of the gang unit, the organized crime unit, and of prosecutors in the Worcester District Court. Judge Cremens graduated from Manhattanville College and Boston College Law School. After seven years as a criminal defense attorney with the Massachusetts Defenders Committee, for the past 24 years she has been in private practice in Boston in criminal, civil, probate and domestic relations matters. Judge Gobourne is a graduate of the City University of New York and Boston College Law School and has served as a CPCS criminal defense attorney, a Suffolk County District Attorney, an Assistant Attorney General, and mostly recently as a member of the Sex Offender Registry Board. He is a former Marine and serves as an officer in the Army's Judge Advocate General's Corps. He completed a one-year tour in Iraq in 2008. Judge Leoney is an attorney with the Major Crimes Unit in the United States Attorney's Office and was previously Deputy Legal Counsel for Governor Michael Dukakis. She is a graduate of Lesley College and the New England School of Law. Judge McGuiggan is a graduate of Assumption College and Wake Forest University School of Law. After two years with Reardon & Reardon in Worcester, for the last thirteen years she has been an Assistant City Solicitor in the City of Worcester's Law Department, litigating primarily civil matters, most recently as head of litigation. Judge Sanabria-Vega graduated from Boston College and the University of Connecticut School of Law. She served as an assistant district attorney in Hampden County, and for the past decade has been a sole practitioner in Springfield handling both criminal and civil matters. Judge Shopteese has spent her 24-year legal career as a CPCS criminal defense attorney, and for the past decade has been Attorney-in-Charge for the Roxbury Defenders Division. A graduate of Kansas State University and Northeastern University School of Law, she teaches trial advocacy at Northeastern and is a Supreme Court Justice of the Native American Sac and Fox Nation, Thunder Clan.

I am pleased to congratulate Brian St. Onge on his appointment as Clerk-Magistrate of the Palmer District Court. A graduate of Springfield Technical Community College, U.Mass. Amherst, and the Massachusetts School of Law, he has been First Assistant Clerk-Magistrate of the East Brookfield District Court since 1995, and has also served for four years as the Acting Clerk-Magistrate of the Uxbridge District Court.

Farewell and best wishes in retirement to Honorable James J. O'Leary (Newburyport), who was the longest-serving member of the District Court bench, after 33 years of judicial service. Judge O'Leary served as First Justice of the Newburyport District Court and, more recently, the Peabody District Court. I have appointed Honorable Matthew J. Nestor (Somerville) as Acting First Justice in Peabody. (The "dean" of the District Court judiciary is now Honorable Philip A. Contant (Westfield),

with 26 years of judicial service.)

Best wishes also to retiring Clerk-Magistrates Margaret E. Palmeri (Greenfield) and Roxana E Viera (Nantucket), and Acting Clerk-Magistrate John A. Sullivan (Plymouth). All three are longtime employees of their courts, culminating in 8 years (for Meg) and 18 years (for Roxana and Jack) in their respective positions. Roxana was also a valued member and sometime chair of the clerk-magistrates' education committee, and her colleagues are grateful for her many contributions to their professional development. I have appointed First Assistant Clerk-Magistrate Darren Alston (Orange) as Acting Clerk-Magistrate in Greenfield, and I have asked Clerk-Magistrate Liza H. Williamson (Edgartown) to serve as Acting Clerk-Magistrate in Nantucket as well.

As already announced, I have appointed Philip J. McCue as Acting Clerk-Magistrate of the Plymouth District Court. Phil will be greatly missed after six years as Director of Court Operations in this office, but I know he welcomes returning to the day-to-day operations of a clerk's office and the bustle of the courtroom. He will continue to function as the District Court's point person for MassCourts. I have asked Deputy General Counsel Ellen S. Shapiro to take over as Acting Director of Court Operations, where her first rate managerial and legal skills will be invaluable. We wish both Phil and Ellen great success in their new challenges.

First Assistant Clerk-Magistrate Stephen C. Poitrast (Dedham) has returned East after four years as Acting Clerk-Magistrate of the Springfield District Court. I am deeply grateful for his unparallelled service and expertise there and for his willingness to serve for such an extended time in our busiest court. I have appointed Assistant Clerk-Magistrate Barbara Y. Burton to succeed him as Acting Clerk-Magistrate in Springfield.

Our sole remaining regional law clerk, Springfield-based Natalie E. Jones, has resigned to practice law with the Social Security Administration. We thank her for her two years of service and wish her well in her new career.

Our regional law clerks, while always few in number, have been an immensely useful resource to the judges. I look forward to being able to reinstate the regional law clerk program in the future when the budget permits. Law Clerk Brien M. Cooper, Esq., is usually fully occupied by his work for the judges of the Appellate Division and with research for our various committees that benefits us all. In the absence of law clerks, please keep in mind that Massachusetts law schools are always ready to make law student interns available to judges for research assistance. Further information is available directly from the law schools or from Ellen Shapiro in this office. An additional resource is the Trial Court's law librarians who, while not attorneys, are expert in legal research methods and welcome judges' requests for documents or other materials. If you do not know your local law librarian personally, a library tour is a good starting point, since electronic databases have greatly changed legal research in recent years. The law librarians may also be contacted through the Legal Research shortcut on the left side of the intranet home page. When outside a courthouse, you may access contact information at http://www.lawlib.state.ma.us/libraries/locations/index.html or request a document by email or fax from http://www.lawlib.state.ma.us/libraries/services/docdelivery.html.

I note that the General Court recently designated the East Brookfield district courthouse as the Francis H. George Courthouse (St. 2010, c. 128). Born on a North Dakota wheat farm, Judge George graduated from Harvard College and Harvard Law School, practiced many years in a Worcester law firm and eventually left to take up private practice, which allowed him more time for his beloved farm and horses. In 1974, Governor Sargent appointed him to what is now the East Brookfield District Court, where Judge George served for 15 years, the last 5 as First Justice. He retired in 1989 at age 70 and died in 2008. He is remembered fondly by all of us who knew him.

10. **Justice Cordy to be SJC liaison to District Court.** We are pleased to welcome Justice Robert J. Cordy as the Supreme Judicial Court's liaison to the District Court for the coming court year, and to express our thanks to Justice Judith A. Cowin for serving in that role this past year. The liaison function allows the Court and us to share a more detailed perspective on our caseload, interests and challenges.

11. **Fall River District Court move.** The Fall River District Court has relocated to its new courthouse. Its new mailing address is: Fall River District Court, Fall River Justice Center, 186 South Main Street, Fall River, MA 02721-5308. Its new telephone numbers are:

Fall River District Court	*Phone*	*Fax*
Main Number	508-491-3200	
Clerk-Magistrate's Office (criminal)	508-491-3225	508-646-3596
Clerk-Magistrate's Office (civil)	508-491-3235	508-646-3492
Probation Department	508-491-3240	508-646-3598
Judge's Lobby	508-491-3280	508-646-3597

12. **Sample "Motion to Seal Record" and "Findings and Order on Motion to Seal Record" forms available.** General Laws c. 276, § 100C provides that criminal cases are to be sealed automatically when they end in a not-guilty, no-probable-cause or no-bill disposition. "[I]f it appears to the court that substantial justice would best be served," it also permits a judge to order a case sealed after it has been nol prossed or dismissed "except in cases in which an order of probation has been terminated." (Effective February 6, 2012, one of the recently enacted CORI law reforms (St. 2010, c. 256, § 131) will remove this qualification, thereby allowing discretionary sealing of cases that have been dismissed after a period of probation.)

The sealing rules set out in § 100C have been qualified by *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989), which held that (except in the case of grand jury no-bills) such sealing violates the First Amendment unless a judge makes "specific, on the record findings that sealing was necessary to effectuate a compelling governmental interest" that in this particular instance outweighs the public's First Amendment presumption of access, and that sealing is the least restrictive means of achieving that interest.

The *Pokaski* case and *Commonwealth v. Doe,* 420 Mass. 142 (1995), set out the procedure that is to be used in such cases. The defendant must file a motion to seal, which the judge should initially consider at a preliminary hearing to determine whether it makes out a prima facie case for sealing. If not, the motion should be summarily denied. If the defendant does make a prima facie case for sealing, then a formal hearing must be held, with prior notice to the Commonwealth, the probation department and any other interested party, and after public notice has been given by posting the motion on a court bulletin board for at least 7 days. After the formal hearing, if the judge allows the motion to seal, the judge must make the specific findings required by *Pokaski* on the record. The petition form used to notify the Office of the Commissioner of Probation may then be completed and endorsed with the judge's approval.

(For additional information on how subsequent cases have interpreted the *Pokaski* standard, see the *Guide to Public Access, Sealing & Expungement of District Court Records* on the homepage of our intranet and internet websites.)

The Committee on Criminal Proceedings has developed an optional "MOTION TO SEAL RECORD" form and a sample "FINDINGS AND ORDER ON MOTION TO SEAL RECORD" form that judges may find useful for considering motions to seal under § 100C. Both forms are available in the Forms area of our intranet site, and the motion form is also available in the Forms area of our internet site.

13. **Swearing in probation officers at probation revocation hearings.** An Appeals Court justice who often sits on probation revocation appeals has observed that judges often forget to swear in the probation officer who provides essential testimony during the hearing. While Dist. Ct. R. Prob. Viol. P. 5(a) allows probation violation hearings to be conducted with "flexibility and informality," it also requires that "[a]ll testimony shall be taken under oath." Please be sure that all witnesses are sworn before they testify at probation revocation hearings.

14. **New media reporting from courtrooms.** Judges are receiving an increasing number of requests to photograph, record or electronically broadcast court proceedings using new technologies. Sometimes these come from traditional "print" news organizations, which are changing rapidly as content sharing becomes more common and reporters are sometimes expected to get video or digital photos to accompany the articles they write. Judges are also increasingly receiving requests from "citizen journalists" who are not from traditional media organizations. These include individuals wanting to produce their own programs for local access cable channels, commentators who would like to put streaming video on their websites, real-time "bloggers," and others. Judges face new challenges when requests for electronic access to a courtroom are no longer limited to experienced staff reporters from recognized media outlets who are familiar with the ground rules in Supreme Judicial Court Rule 1:19 ("Cameras in the Courts"). The electronic equipment involved poses security as well as access issues. Trial judges in other states are also grappling with such requests.

The Supreme Judicial Court's Judiciary-Media Committee recently formed a subcommittee to consider what changes to Rule 1:19 might be needed in light of the many issues being raised by the new technology and reporting formats. The Rule 1:19 Subcommittee is co-chaired by Honorable John J. Curran, Jr. (ret.) and by Neil Ungerleider, Executive Editor of WCVB-TV. Joan Kenney, the courts'

Public Information Officer, and Mike Shea, Executive Director and General Counsel in this office, are among its members. Any of them would welcome your thoughts, suggestions and experiences with regard to the challenges posed by this changing media landscape.

Meanwhile, judges should be aware of and guided by the existing rules in this area:

- Supreme Judicial Court Rule 1:19 governs "broadcasting, televising, electronic recording, or taking photographs" in courtrooms by the "news media" for news gathering and dissemination purposes. It does not directly address the use of cameras or recording devices by private citizens or litigants. The rule forbids all recording and close-up photographing or televising of suppression, dismissal, probable cause and voir dire hearings, and authorizes a judge to limit or suspend electronic news coverage if it appears there is "a substantial likelihood of harm to any person or other serious harmful consequence." The rule bars frontal or close-up photography of jurors, and recording or close-up photography or televising of bench conferences and conferences among counsel, or between counsel and clients. It also requires reasonable advance notice to the court, and limits the number and intrusiveness of the equipment used. The text of Rule 1:19 is available on the internet at http://www.massreports.com/courtrules/sjcrules.htm#1:19.

- District Court Special Rule 211(B) forbids all covert electronic recording in a courtroom, hearing room, office, chambers or lobby of a judge or magistrate without prior authorization. It permits any party to a case to seek court permission to record a proceeding if there is no official court recording device. The text of Rule 211 is available on the internet at http://lawlib.state.ma.us/source/mass/rules/district/special/spec211.html.

- As noted in Item 1 above, the Trial Court's "Policy on Juror Use of Personal Communication Devices" (March 26, 2010) prohibits seated jurors from using a computer, cellular phone, or other electronic device with communication capabilities during trial or jury deliberations. Its text is available in the Judges area of our internet site and also on the internet at http://www.jud.state.ma.us/cjam-policy-juror-use-personal-devices.html.

- Finally, the Trial Court's "Policy on Clothing, Cameras and Cellular Telephones" (January 9, 2006) prohibits anyone from bringing a camera or a video or tape recorder into a courthouse, and from using the camera or recording capabilities of a cellular phone in a courthouse, except for news media operating in accordance with S.J.C. Rule 1:19. Its text is available in the Judges area of our internet site and also on the internet at http://www.mass.gov/courts/policy-on-clothing-cameras-cellulars010906.pdf

I recommend that any judge faced with an access request that is not directly resolved by the existing rules consult with Public Information Officer Joan Kenney (617-557-1113; FAX: 617-742-1807; joan.kenney@sjc.state.ma.us), who can offer suggestions and inform you of any similar developments in the Massachusetts court system related to this rapidly changing media landscape.

15. **Appellate Division opinions available online.** The Trial Court's law libraries now post on their internet website at http://masscases.com/distapp.html all new District Court Appellate Division opinions. Thanks to Marnie Warner, the Trial Court's Law Library Coordinator, and Meg Hayden, its Electronic Resources Librarian, for assisting us in making Appellate Division opinions available to attorneys and the general public without charge.

16. **BasCOT no longer updated for courts using MassCourts for civil processing.** As individual district courts transition from the interim BasCOT computer system to the new MassCourts computer system for processing civil cases, it is important to keep in mind that the BasCOT system will no longer have updated information for existing or new civil cases in those courts that have already made the transition to the MassCourts system. As of August 30, 2010, these will include the Ayer, Brookline, Gardner, Ipswich, Newburyport, Newton, Peabody, Winchendon and Woburn district courts and the Boston Municipal Court's Brighton and West Roxbury Divisions. The Trial Court's Information Services Department is working to make public access terminals available in those courts.

I am requesting each clerk's office to post the attached notice near their BasCOT public access terminal in order to inform users that we have begun phasing in this change.

Clerks' offices that are still using BasCOT should also keep in mind that they may no longer electronically transfer civil cases to those courts that are now using MassCourts rather than BasCOT to process their civil cases. Nor are the courts using MassCourts able to transfer civil cases electronically to other courts. Any court that receives a transferred case from a court that is now using MassCourts for its civil cases must assign its own docket number to that case before reentering it into BasCOT (or MassCourts, if the receiving court is also using MassCourts for civil cases). Neither the BasCOT nor MassCourts systems permit the same case number to be used twice, so the receiving court will not be able to reuse the original docket number from the sending court.

17. **DMH forensic evaluations eliminated at Tewksbury Hospital.** Effective July 19, 2010, the Department of Mental Health has eliminated all forensic evaluation admissions at Tewksbury Hospital. DMH will continue to operate mental health units there, but forensic evaluations that were previously done at those units will now be done at one of DMH's three consolidated forensic evaluation sites, at Taunton State Hospital, Worcester State Hospital or Solomon Carter Fuller Mental Health Center in Boston.

The district courts most likely to be affected by this change are the Gloucester, Haverhill, Ipswich, Lawrence, Lowell, Lynn, Malden, Newburyport, Peabody and Salem district courts.

DMH indicates that it is undertaking this consolidation of forensic evaluation sites after careful study and as part of its efforts to redesign aspects of the mental health system. It also emphasizes that, to continue to maximize consistency and coordination with the courts, the Department's court clinic and inpatient staff will continue to coordinate and identify one of the three designated facilities for any person who is committed for forensic observation and examination.

We will continue to work closely with the Department of Mental Health as needed.

TRIAL COURT OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT

PLEASE BE AWARE THAT THOSE DISTRICT AND BMC COURTS THAT NOW USE THE MASSCOURTS COMPUTER SYSTEM TO PROCESS THEIR CIVIL CASES ARE NO LONGER UPDATING THE BASCOT COMPUTER SYSTEM WITH INFORMATION ABOUT NEW AND EXISTING CIVIL CASES.

The **AYER** and **PEABODY** District Courts and the BMC's **BRIGHTON** Division made that transition on June 18, 2010.

The **GARDNER, IPSWICH, NEWBURYPORT** and **WINCHENDON** District Courts made that transition on July 12, 2010.

The BMC's **WEST ROXBURY** Division made that transition on July 26, 2010.

The **BROOKLINE** District Court made that transition on August 9, 2010.

The **NEWTON** and **WOBURN** District Courts made that transition on August 30, 2010.

CHECKLIST FOR EXTENDING 209A ORDERS

LEGAL STANDARD

The plaintiff must show by a preponderance of evidence that the defendant is ***currently:***

☐ causing or attempting to cause the plaintiff physical harm, *or*

☐ placing the plaintiff in reasonable fear of imminent serious physical harm, *or*

☐ causing the plaintiff to engage involuntarily in sexual relations by force, threat or duress. *G. L. c. 209A, § 1*

RELEVANT FACTORS

☐ Content and credibility of the: *Ginsberg v. Blacker,* 67 Mass. App. Ct. 139 (2006)

☐ plaintiff's affidavit ☐ plaintiff's testimony ☐ defendant's testimony

☐ Factual basis of existing order as relevant to risk of future abuse *Iamele v. Asselin,* 444 Mass. 734 (2005)

☐ Serious prior physical abuse or egregious nature of relevant prior crimes *Id.*

☐ Ongoing child custody or other litigation or disputes likely to engender hostility *Id.*

☐ Likelihood that parties will encounter one another during their usual activities involving: *Id.*

☐ residence ☐ workplace ☐ social occasions ☐ religious activity ☐ school ☐ other: _____

☐ Defendant's past violations of restraining orders, or domestic assault and/or battery *Id.*

☐ Defendant's criminal record for: _____

☐ Defendant's threats of violence toward plaintiff

☐ Defendant's displays of anger or menace toward plaintiff *Comm. v. Robichaud, 421 Mass. 176 (1995); Ginsberg*

☐ Defendant's other intimidating or controlling conduct in lieu of contacting plaintiff *Vittone,* 64 Mass. App. Ct. 479 (2005)

☐ Defendant's stalking, repetitive or compulsive contacts with plaintiff *Smith,* 75 Mass. App. Ct. 540 (2009)

☐ Defendant's trauma or threat of harm to plaintiff's minor child(ren) *Smith; Vittone*

☐ Plaintiff's prior testifying against defendant in criminal case *Vitttone*

☐ The parties' demeanor in court *Iamele*

☐ An adverse inference from the defendant's failure to testify *Vittone*

(Such inference is not itself sufficient and does not shift the burden of proof.) *Jones v. Gallagher*, 54 Mass.App.Ct. 883, 890 (2002)

☐ Defendant does not object to the extension of the order

☐ Other: _____.

RELEVANT CASELAW ON EXTENDING 209A ORDERS

- ***Same standard as for initial order.*** "[A] plaintiff seeking an extension of a [G.L. c. 209A] protective order must make a showing similar to that of a plaintiff seeking an initial order [but as of] the time that . . . an extension of an order is sought . . . . The inquiry at an extension hearing is whether the plaintiff has shown by a preponderance of the evidence that an extension of the order is necessary to protect her from the likelihood of 'abuse' as defined in G. L. c. 209A, § 1. Typically, the inquiry will be whether a plaintiff has a reasonable fear of 'imminent serious physical harm.' G. L. c. 209A, § 1(b). If the plaintiff were suffering from attempted or actual physical abuse, see G. L. c. 209A, § 1(a), or involuntary sexual relations, see G. L. c. 209A, § 1(c), there is no question that an extension should be granted." *Iamele v. Asselin,* 444 Mass. 734, 734-735, 739-740 & n.3, 741 n.6 (2005).

- ***No presumption of extension.*** At a hearing "for an extension of an order issued after notice to the defendant and an opportunity to be heard, the plaintiff is not required to re-establish facts sufficient to support that initial grant of an abuse prevention order." *Rauseo v. Rauseo,* 50 Mass. App. Ct. 911, 913 (2001). However, "[n]o presumption arises from the fact that a prior order has issued; it is the plaintiff's burden to establish that the facts that exist at the time extension of the order is sought justify relief." *Smith v. Jones,* 67 Mass. App. Ct. 129, 133 (2006). The prior issuance of a one-year order is not itself sufficient reason to issue a permanent order absent "a finding that a permanent order is, in fact, what is reasonably necessary to protect" the plaintiff from abuse. *Jones v. Gallagher,* 54 Mass. App. Ct. 883, 889 (2002).

- ***Same definition of "abuse."*** "'Abuse' has the same statutory definition in the context of initial, extended, and permanent orders, and there is no presumption or entitlement that an initial order will be continued or made permanent absent a showing of continued need . . . . The inquiry is particularized and situation dependent, calling upon the judge to examine the words and conduct in the context of the entire history of the parties' hostile relationship." *Vittone v. Clairmont,* 64 Mass. App. Ct. 479, 485-487 (2005). Past abuse alone is not sufficient. *Dollan v. Dollan,* 55 Mass. App. Ct. 905 (2002). "Generalized apprehension, nervousness, feeling aggravated or hassled, i.e., psychological distress . . . , when there is no threat of imminent serious physical harm, does not rise to the level of fear of imminent serious physical harm . . . . The judge must focus on whether serious physical harm is imminent . . . ." *Wooldridge v. Hickey,* 45 Mass. App. Ct. 637, 639 (1998). "The standard for determining whether a defendant's acts rise to the level of abuse . . . is not subjective. Rather, the court looks to whether the plaintiff's apprehension that force may be used is reasonable." *Carroll v. Karte,* 56 Mass. App. Ct. 83, 87 (2002). It "closely approximates the common law description of the crime of assault." *Commonwealth v. Gordon,* 407 Mass. 340, 349 (1990).

- ***Absence of incidents not controlling***. "The fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order." G. L. c. 209A, § 3. This is the rule because "in some cases, respondents will obey the initial order, and that obedience alone is not a ground for refusing an extension of the initial order." *Iamele,* 444 Mass. at 738. "But the provision surely does not make the absence of abuse irrelevant" as to the likelihood of further abuse. *Smith v. Jones,* 75 Mass. App. Ct. 540, 545 n.10 (2009).

- ***Extension of mutual orders*** additionally requires "specific written findings of fact" and "a detailed order, sufficiently specific to apprise any law officer as to which party has violated the order, if the parties are in or appear to be in violation of the order." *Uttaro v. Uttaro,* 54 Mass. App. Ct. 871 (2002); *Sommi v. Ayer,* 51 Mass. App. Ct. 207 (2001).