TRANSMITTAL NO. 307	
Last Transm. No. to:	
Presiding Justices	306
Other Judges	306
Clerk-Magistrates	306
CPO's/POIC's	306

Trial Court of the Commonwealth
District Court Department

SAMUEL E. ZOLL
Chief Justice

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Presiding Justices: Please distribute copies (enclosed) of this Bulletin to the Clerk-Magistrate and C.P.O. of the court. Other Judges, and C.P.O.s of juvenile probation districts, will receive their copies directly from this office. Thank you.

Bulletin No. 2-89

May 12, 1989

LETTER FROM THE CHIEF JUSTICE

1. Personnel update
2. Administrative office: Staff changes
3. Appellate Division: Special Committee on Rule 64 formed
4. Appointments
5. Child custody: C & P investigators
6. CHINS: Standards
7. Civil law and procedure: Civil action for "shoplifting"
8. Claims and lawsuits against the courts: Courts served with legal process
9. Claims and lawsuits against the courts: No legal immunity for failing to carry out ministerial duties
10. Court administration: Coordination with other departments
11. Crimes and criminal procedure: Sequestering witnesses
12. Defaults: Accounting for costs payable to municipalities
13. Drugs: Report enclosed
14. Drunk driving: Sec. 24N "per se" procedures upheld
15. Drunk driving: OUI alternative sentencing program available
16. Education: Judges approval for attendance at Flaschner Institute programs
17. Ethics: Court employees serving process as constables or deputy sheriffs
18. Holiday observance: Legal holidays in calendar year 1989
19. Indigent persons: CPCS representation of codefendants
20. Indigent persons: Income limits for indigency determination
21. Indigent persons, civil court costs: Waiver
22. Judges: Advisory opinions on judicial ethics
23. Judges: Insight into the rewards and frustrations of judging
24. Juries: Alternate jurors in the deliberation room
25. Juries: Jurors' oaths
26. Landlord-tenant: Late filing in summary process not permitted

(over)

27. Landlord-tenant: Mandatory minimum damages in housing cases
28. Law related education: ABA award
29. Legislation: Annual notice on filing
30. Mental health: Civil commitment hearings at Metropolitan State Hospital
31. Mental health: Civil commitment hearings, clinicians qualified for independent examinations
32. Mental health: Committee work progresses
33. Motor vehicles: Discovery in CMVI's
34. Motor vehicles: Registry abstract entry on jury session default
35. Motor vehicles: Registry fees for removing defaults and reinstating licenses
36. Motor vehicles: Some reminders on CMVI hearings
37. Personnel: Giving recognition
38. Probation: Day supervision fees in cases transferred to jury sessions
39. Search warrants: Public access to search warrants and affidavits
40. Sentencing and dispositions: Community work service and liability issues
41. Sentencing and dispositions: No sentencing to Braintree Alternative Center
42. Sentencing and dispositions: Study on female offenders
43. Support enforcement: Increased support collections
44. Support enforcement: 60-day notice of criminal case dismissals
45. Support enforcement: New address and phone number for DOR/IEB
46. Warrants: Oral search warrants or arrest warrants invalid

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May 12, 1989

To all District Court Judges, Clerk-Magistrates and Chief Probation Officers:

It is with both pleasure and sadness that I make mention of District Court employee Judith C. Hollum, Head Procedures Clerk in the Amesbury District Court: pleasure because on December 15, 1988 Ms. Hollum was awarded the 1988 Chief Administrative Justice Award for Outstanding Service to the Trial Court, but deep sadness because I must report that Ms. Hollum passed away unexpectedly on February 14, 1989.

Judy Hollum symbolized the high spirit and dedication that so many in the District Court bring to their work. Every day she worked in an old facility, accepting greater demands on her skills and knowledge, her spirit never affected by declining resources and the changes necessary to accommodate to new systems. Judy always had the ability to reach for that something "extra" when frustrations could have overtaken her. She was able to do her work in the clerk's office with great skill, infinite patience and a sensitive touch to those who worked with her as well as persons who sought her assistance at the counter. She took the problems of others seriously, and the easiness with which she interacted with everyone left an indelible impression on all who knew and worked with her.

Judy's legacy of service shall always be a challenge for others to meet.

Respectfully,

Samuel E. Zoll
Chief Justice
District Court

SEZ:msr

1. Personnel update. Welcome to the following judges of the District Court who have been sworn in since the last Bulletin: Hon. Daniel F. Toomey (Leominster), Hon. Martha A. Scannell-Brennan (Clinton), Hon. Eugene G. Panarese (Chelsea), Hon. Sarkis Teshoian (Uxbridge), Hon. Maria I. Lopez (Chelsea), Hon. Christine McEvoy (Concord), Hon. Robert B. Ziemian (West Roxbury), Hon. Severlin B. Singleton III (Cambridge), Hon. David G. Nagle, Jr. (Brockton) and Hon. Philip A. Beattie (as a District Court Circuit Justice).

Congratulations also are in order to Wendie I. Gershengorn (Cambridge) on her appointment to the Superior Court.

And a "thanks," with good wishes for their retirement, to Hon. Henry A. Tempone (Somerville), Hon. John P. Donnelly (Malden) and Hon. Francis H. George (Spencer). Special recognition is due Hon. David B. Williams who has retired as Presiding Justice of the Ayer District Court and as "dean" and senior justice of the District Court judges, a rank now assumed by Hon. Henry P. Crowley of Brookline.

I would also like to thank Clerk-Magistrate James M. Gillis for the long and dedicated service to the District Court that preceded his recent retirement.

Please note also that Hon. Baron H. Martin has assumed the role of Presiding Justice of the Wareham District Court, Judge Robert L. Anderson having decided to decline further service in that capacity.

2. Administrative office: Staff changes. The good news is that Robert Clayman has been appointed as Executive Director of the Judicial Institute, the new training and education arm of the Trial Court. The bad news is that Robert will no longer be able to serve as District Court LRE Coordinator. Under Robert's guidance, District Court LRE activities have grown despite increasing caseloads and the availability of less local court time for these activities. I am sure that we all join in wishing Robert well in his new position where he will continue to devote his considerable energy and imagination to the needs of the Trial Court.

With Robert's departure the coordinating role for LRE will shift in large measure from this office to the Supreme Judicial Court's Public Information Office. The SJC has a long history of activity in LRE, and in fact has been the source of funding for much of the District Court's LRE activities. With the recent addition of a Public Information Officer in the Court, I believe that the incorporation of LRE activities within the ambit of that office makes good sense. I am informed that the SJC will be appointing someone to work almost exclusively in the LRE area.

3. Appellate Division: Special Committee on Rule 64 formed. A group of District Court judges has been assembled to review and hopefully simplify the procedure by which appeals are taken to the Appellate Division in civil cases. That procedure is set forth in Rule 64 of the Dist./Mun. Cts. R. Civ. P.

Appointed to the Special Committee on Rule 64 are Hon. Kevin R. Doyle, Chair, Hon. John P. Forte, Hon. Bernard Lenhoff, Hon. Arthur Sherman, Hon. Lawrence D. Shubow and Hon. Daniel F. Toomey. Assigned by Boston Municipal Court

Chief Justice William J. Tierney is Hon. Herbert Hershfang of that court. Suzanne Hurley, Law Clerk to the Appellate Division, Northern District, will serve as staff.

With the increase in civil business being experienced in the District Court due to the increase in the remand amount and other factors, the need for an effective and understandable procedure for appeal is more needed than ever. I appreciate the Special Committee's willingness to serve, and look forward to its contribution in this important area.

4. Appointments. I am pleased to announce my appointment of Hon. Robert A. Belmonte as Presiding Justice of the Middlesex Juvenile Probation District, a position left vacant upon Judge David Williams' retirement.

I would also like to note the appointment of Assistant Clerk James J. Foley, Jr. to the Supreme Judicial Court's Standing Advisory Committee on the Rules of Civil Procedure.

5. Child custody: C & P investigators. As courts were informed by Transmittal No. 273, dated June 21, 1988, a new fee arrangement for care and protection investigators has been implemented by the Chief Administrative Justice. In short, the flat fee has been replaced by an hourly rate, which should result in payments which are more reflective of the amount of work actually performed by investigators.

In most instances this will result in a higher fee per case. The new arrangement may therefore present a good opportunity for courts to recruit some new investigators, since many qualified people may previously have been unwilling to accept appointments for a flat fee. It is suggested that, in those courts which have been using the same investigators for all appointments, or in which the investigators are only marginally qualified, fresh recruitment efforts would represent time well spent.

6. CHINS: Standards. Currently, work is underway to develop a set of Standards of Judicial Practice in CHINS cases. If any judges or other court personnel would be interested either in reviewing and commenting upon a final draft prior to promulgation, whenever the draft is ready, please get in touch with Debbie Propp at this office. The Committee on Care and Protection and CHINS Proceedings would welcome your input. (Please note that the final draft will not be ready for some time.)

7. Civil law and procedure: Civil action for "shoplifting". A civil cause of action was enacted on July 22, 1986 for damages resulting from shoplifting and certain other larcenies (St. 1986, c. 335, effective January 1, 1987). The new procedure is set forth in G.L. c. 231, s. 85R1/2, but it appears that the courts are not uniformly aware of it.

The law provides merchants with a cause of action in tort to recover for damages resulting from:

- larceny or attempted larceny under G.L. c. 266, s. 30A;

- larceny or attempted larceny of goods for sale on the premises of a merchant; and

- larceny or attempted larceny of personal property of employees or customers or others present on the premises of a merchant.

The statute indicates that liability for such damages shall be not less than $50 nor more than $500, in addition to any actual damages incurred, and that the small claims procedure may be used, consistent with the monetary limitations of that procedure. It appears that this statute gives the court the discretionary authority to impose damages in the nature of punitive damages from $50 to $500, and was intended primarily to provide merchants with an effective means of transferring shoplifting prevention costs (store detectives, anti-shoplifting devices, etc.) to the perpetrator.

Apparently there has been confusion on the part of some concerning this law and its relationship to criminal proceedings. The statute should be reviewed and the following points observed:

A. This civil action and the usual criminal proceedings for the alleged crimes involved are **separate and independent**, that is, an aggrieved party has a right to seek a criminal complaint and at the same time proceed with the civil remedy. The commencement of the civil action does not deprive the claimant of the right to seek a criminal complaint, and vice versa.

B. If a criminal complaint issues in the usual course while a civil action is still pending, or after a civil judgment has been awarded, the prosecutor will have to decide whether to prosecute the case. If the case is prosecuted, the pendency of the civil action or the award of a civil judgment may be relevant to the judge on disposition in terms of such matters as restitution, continuance with conditions, fines or other dispositional issues. But, again, pursuit of the civil remedy does not deprive the aggrieved party of the right to seek a criminal complaint.

Note that G.L. c. 231, s. 85, another statute enacted along with s. 85R1/2 in St. 1986, c. 335, imposes liability on parents for damages caused by an unemancipated minor child resulting from injury or death to another, or property damage, including damage resulting from larceny or attempted larceny under G.L. c. 266, s. 30A, and damage to cemetery property or state or local public property. Thus this new parental liability may also be invoked in an action against the parents under s. 85R1/2, where the alleged damages result from larceny or attempted larceny by the minor child under G.L. c. 266, s. 30A.

8. Claims and lawsuits against the courts: Courts served with legal process. In Lally v. Dorchester Div. of the Dist. Court Dep't, 26 Mass. App. Ct. 724, 728 n.8, 531 N.E.2d 1275, 1278 n.8 (1988), the Appeals Court reminded local courts that they must not ignore legal process served upon them, since G.L. c. 12, s. 3 requires that "[w]rits, summonses or other processes served upon [Commonwealth] officers shall be forthwith transmitted by them to [the Attorney General]."

As I have requested previously in Bltn. No. 4-83, Item 11 (December 23, 1983) and Bltn. No. 1-84, Item 20 (February 29, 1984), any legal process or related correspondence served on a district court or its officers should be sent immediately to Michael J. Shea, legal counsel in this office, and also to Michael F. Edgerton, the Trial Court's general counsel, who will determine whether to request representation from the Attorney General's office or make other arrangements for representation. Please do not forward process directly to the Attorney General's office. The established procedure permits appropriate administrative supervision of pending litigation involving Trial Court divisions.

9. Claims and lawsuits against the courts. No legal immunity for failing to carry out ministerial duties. Discussions about the liability of Clerk-Magistrates and Probation Officers for errors in the performance of their official duties often focus on their discretionary decisions: whether to issue an arrest warrant or a search warrant, whether to recommend that a Judge revoke probation, etc. Because these determinations involve some judgment and discretion, and many are eventually subject to some form of judicial review, they may seem the most obvious focus of liability concerns.

Two recent cases remind us, however, that a failure to carry out non-discretionary, "ministerial" duties may prove far more likely to be a source of liability and professional embarrassment.

By now, the first case is familiar to most probation officers. A.L. v. Comm., 402 Mass. 234, 521 N.E.2d 1017 (1988), held that the Commonwealth may be found liable for money damages under the Massachusetts Tort Claims Act (G.L. c. 258) for damages suffered by a third party because of a Probation Officer's negligent failure to monitor a probationer's compliance with his terms of probation. In this case, the Probation Officer failed to discover that a probationer placed under his supervision, who was a convicted child abuser and had been ordered to refrain from teaching and from all contact with young boys, was working as a middle school teacher, until a new incident of sexual abuse occurred with a student. The S.J.C. dismissed the Attorney General's argument that the Probation Officer's failure to verify where the defendant worked fell within the "discretionary function" exemption of the Tort Claims Act:

> There is no reasonable basis to support the Commonwealth's argument that a probation officer's duty to monitor a probationer's compliance with the terms of his or her probation involves policy or planning judgment . . . . Rather, policy decisions with respect to a probationer are made by the sentencing judge, who places the convicted defendant on probation and sets the terms of the probation. The probation officer's monitoring of the probationer's compliance with the probation primarily is an administrative function. We recognize, of course, that probation officers exercise their judgment in carrying out the court's orders . . . . [But m]onitoring the conditions of probation is not a job function a probation officer performs at his or her discretion.

402 Mass. at 245-246, 521 N.E.2d at 1024. The court also dismissed the

Commonwealth's assertion that the Probation Officer's inaction was covered by some form of quasi-judicial immunity:

> The Commonwealth may not invoke [the probation officer's] possible immunity unless [he] acted pursuant to a judge's directive or otherwise in aid of the court. The evidence in this case indicates just the opposite. Any claim to immunity which the Commonwealth might have asserted ceased when [the probation officer] failed to aid in the enforcement of the conditions of [the criminal defendant's] probation.

402 Mass. at 247, 521 N.E.2d at 1025.

The Supreme Judicial Court came to a similar conclusion in Jordan v. Sinsheimer, 403 Mass. 586, 531 N.E.2d 574 (1988). That case involved a civil action for money damages under the Federal Civil Rights Act (42 U.S.C. s. 1983) brought by a former criminal defendant against a former Assistant District Attorney who had failed to obey a court order to return several videotapes that had been seized from the criminal defendant during the earlier prosecution. The court rejected the former prosecutor's claim that either absolute or qualified prosecutorial immunity insulated him from liability:

> The defendant in this case had no discretion to exercise concerning the return of the tapes . . . . An obligation to carry out a clear court order involves no exercise of discretion.

403 Mass. at 589, 531 N.E.2d at 576.

These two cases together suggest that neither the "discretionary act" exemption in the Massachusetts Tort Claims Act, nor the qualified immunity that normally surrounds the discretionary acts of quasi-judicial officers such as Clerk-Magistrates and Probation Officers, will be of help where there has been a negligent failure to carry out a definite, non-discretionary obligation of office. This potential liability should emphasize the importance of properly performing or supervising such routine ministerial tasks as recalling warrants, recording the payment of fines, or checking that specific probationary terms are adhered to.

10. Court administration: Coordination with other departments. From time to time I learn of certain conflicts in coordination between the District Court and other departments that appear to frustrate good caseflow management in the District Court. Included are such things as a judge "freezing" a jury pool and not releasing jurors to the District Court, insisting on the presence of public defenders or private counsel notwithstanding previously scheduled District Court engagements, etc. When judges encounter these problems I would appreciate their so informing the District Court Regional Administrative Judge so that we may be better informed and work in the direction of some settled policies in these areas.

11. Crimes and criminal procedure: Sequestering witnesses. It has long been customary to sequester witnesses at the request of either party to a trial.

A criminal defendant must, of course, be exempted from any sequestration order. Mass. R. Crim. P. 21. It has also been held proper to exempt expert witnesses, Comm. v. Jackson, 384 Mass. 572, 582, 428 N.E.2d 289, 295 (1981), as well as non-experts who are essential to the presentation of a case, such as investigating officers, see e.g. Comm. v. [illegible], 1 Mass. App. Ct. [illegible], [illegible] 268 N.E.2d 908, 909 (1971). Proposed Mass. R. Evid. 615 (July 1980) offered the following formulation of the rule and exceptions:

> At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

While Mass. R. Crim. P. 21 leaves to a trial judge's discretion whether to follow the traditional practice of sequestration, appellate cases have often suggested that sequestering witnesses on request is the better practice. See e.g. Comm. v. Blackburn, 354 Mass. 200, 203, 237 N.E.2d 35, 38 (1968). In Comm. v. Watkins, 373 Mass. 849, 850-851, 370 N.E.2d 701, 702-703 (1977), the Supreme Judicial Court indicated that there was "force in [the] contention" that it was an abuse of discretion for a judge to deny a sequestration motion purely as a matter of that judge's "usual practice." Since the Watkins decision, the Appeals Court has forcefully urged trial judges to allow sequestration motions routinely: "To deny such a motion as a matter of practice rather than for reasons related to the particular case presents unnecessary problems on any appeal." Comm. v. [illegible], 11 Mass. App. Ct. 343, 352, 416 N.E.2d 191, [illegible] (1981).

Recently bar association leaders have urged the Supreme Judicial Court to amend Rule 21 to make sequestration mandatory. Such a change has not yet been adopted, but I believe the best practice is for judges to conform their practice to the above procedure, presumptively allowing sequestration motions, subject to appropriate exceptions in particular cases.

17. Defaults. Accounting for costs payable to municipalities. Costs may be imposed against defaulting defendants under Mass. R. Crim. P. 6(c)(3) and be ordered payable to the municipality involved in the case. See Dis. Ct. [illegible] (Item 24, April 13, 1987 (Transmittal No. 182)). The question has been asked how these costs should be accounted for, since there is a register key for costs payable to the state but none for costs payable to municipalities. After requesting guidance on this point from the fiscal office of OCAJ, it appears that costs should be entered by means of the "miscellaneous" register key.

18. Drugs. Report enclosed. I am pleased to enclose with copies of this bulletin sent to judges and chief probation officers a copy of the publication entitled Drugs: The American Family in Crisis. A Judicial Response: 32 Recommendations. This report was prepared by the Metropolitan Court Judges Committee of the National Council of Juvenile and Family Court Judges, and has

been adopted by the full Council as a statement of national policy.

Assisting in all stages of the development of this report was Hon. Gordon A. Martin, Jr. of the Roxbury District Court, who serves as the Massachusetts member of the Metropolitan Court Judges Committee. My thanks to Judge Martin for his contribution to this timely and informative work.

To obtain additional copies of this report, please contact Debbie Propp of this office.

14. Drunk driving: Sec. 24N "per se" procedures upheld. The Supreme Judicial Court has upheld the "per se" license suspension law (G.L. c. 90, s. 24N) against a variety of attacks. Comm. v. Crowell, 403 Mass. 381, 529 N.E.2d 1339 (1988), held that s. 24N does not deny a defendant due process (at least where the defendant is offered an opportunity to rebut the Commonwealth's prima facie case, as I have previously suggested be done), it does not deny a defendant the presumption of innocence, and it does not unfairly pressure a defendant to plead guilty rather than go to trial. The case also determined that police are not required to notify a driver of potential s. 24N consequences when offering a breathalyzer test, nor to present evidence of "public way" as part of their s. 24N prima facie case.

The S.J.C. also confirmed an earlier ruling of the Appeals Court (Comm. v. Callen, 26 Mass. App. Ct. 920, 524 N.E.2d 681 (1988)), reported in Bltn. 2-88, Item 14, September 23, 1988, Transmittal No. 284) that a defendant is not entitled to be awarded "credit" against any period of license suspension imposed under G.L. c. 90, s. 24D for any earlier period of license suspension at arraignment under s. 24N. The court noted that "[e]ach of these provisions is part of the Safe Roads Act of 1986. If the Legislature had intended that on conviction credit must be given [for] days of suspension under s. 24N, it would have said so." 403 Mass. at 388, 529 N.E.2d 1343.

15. Drunk driving: OUI alternative sentencing program available. This office has been notified of the program called Emergency Nurses C.A.R.E. (Cancel Alcohol Related Emergencies) as a possible resource for alternative sentencing in OUI cases. Emergency Nurses C.A.R.E. is a non-profit organization started by two Massachusetts emergency nurses six years ago with the goal of changing attitudes and behavior about drinking and driving, especially among young people. The organization now involves over 1,000 emergency nurses in over 150 communities in 25 states. In Massachusetts there are 25 chapters.

The program, which is conducted by emergency nurses who volunteer their time, centers on a slide presentation that shows accident victims being treated in a hospital emergency room after drinking and driving. The organization states that these presentations are made with sensitivity and dignity.

More information is available from Executive Director Barbara A. Foley, R.N., at:

Emergency Nurses C.A.R.E.
P.O. Box 4571
18 Lyman Street
Westborough, MA 01581
Tel.: 617/366-7591

16. Education: Judges approval for attendance at Flaschner Institute programs. Attendance at programs of the Flaschner Judicial Institute are encouraged by the Trial Court, and I hope that all judges will take advantage of these offerings to the maximum extent possible. Judges are reminded, however, that attendance at Flaschner Institute programs, like attendance at all programs of judicial education, is subject to the advance approval of the Regional Administrative Judge. This is necessary in order to ensure that sufficient judges are available for the daily sessions. Judges interested in attending educational programs should contact the appropriate Regional Administrative Judge before registering.

17. Ethics: Court employees serving process as constables or deputy sheriffs. In Conflict Opinions 85-41 (May 28, 1985) and 82-59 (May 5, 1982), the State Ethics Commission set out several restrictions that the State Ethics Act imposes on Court Officers and other employees of the District Court who hold after hours positions as municipal constables.

First, they may not serve process in any case filed in any district court (since the entire District Court Department is considered their state "agency" for conflict-of-interest purposes). They are permitted to serve process issued by the other six departments of the Trial Court.

Second, even as to other Trial Court departments, they may not serve process on behalf of the Commonwealth or any state agency (e.g. the Department of Public Welfare) unless the "public notice or . . . competitive bidding" exemption of G.L. c. 268A, s. 7(b) was met in their selection by the state agency.

Finally, in fulfilling their constable functions they are subject to the standards of conduct set out in G.L. c. 268A, s. 23. These prohibit, for example, performing Court Officer and constable duties simultaneously, soliciting clients for one's constable services by referring to one's court position, or using court time, employees, equipment or supplies to conduct constable business.

It appears that these same limitations would also apply to any District Court employee who holds an appointment as a county deputy sheriff, except that the "public notice" exception for municipal appointees would not be available. Employees who are deputy sheriffs should observe these restrictions or seek a clarifying opinion from the State Ethics Commission.

The State Ethics Act makes even unwary violations of these limitations punishable by civil fines of up to $2,000. In addition, Section 8.100 of the Trial Court's Personnel Policies and Procedures Manual requires compliance with

existing statutes in outside employment. Presiding Justices, Clerk-Magistrates and Chief Probation Officers should bring these limitations to the attention of any employees who serve as constables or deputy sheriffs in their off-hours.

18. Holiday observance: Legal holidays in calendar year 1989. At pages 25-26 will be found a memorandum listing the legal holidays in calendar 1989 and the dates on which they will be observed in the Trial Court.

19. Indigent persons: CPCS representation of codefendants. Judges appointing counsel for codefendants in a criminal case should be aware that the Committee for Public Counsel Services has a per se rule prohibiting any CPCS-provided attorney from representing more than one codefendant in a criminal case, even in cases where the interests of the codefendants do not appear to be in conflict. CPCS adopted this administrative rule on September 11, 1986, pursuant to its rulemaking authority under G.L. c. 211D over its own attorneys.

It appears that the genesis of this rule is not widely known. This seems to have sometimes engendered confusion among judges who were aware of S.J.C. Rule 3:08, DR 5-105(C) (permitting a lawyer to represent multiple clients with differing interests "if it is obvious that [the lawyer] can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each"), but not aware of the more stringent standard CPCS had prescribed for its own attorneys.

CPCS obviously felt that avoiding even a suggestion of possible conflict was an important enough goal for it to undertake the additional administrative and financial burden of providing additional attorneys in cases with multiple defendants.

20. Indigent persons: Income limits for indigency determination. When a party to either a civil or a criminal case requests waiver of fees or public payment of costs under G.L. c. 261, ss. 27A-27C, the second of the three definitions of indigency is "a person whose income, after taxes, is one hundred and twenty-five percent or less of the current poverty threshold" established annually by the federal government. Effective April 1, 1987, that same standard was added to S.J.C. Rule 3:10 as one of the standards of eligibility for court-appointed counsel. (See Transmittal No. 183, March 16, 1987.)

The threshold amounts under the standard have recently changed, and applying the statutory 125% computation, the new income limits for indigency under this standard are as follows:

Size of family unit	To be found indigent under the second test of G.L. c. 261, s. 27A income must not exceed
1	$ 7,475
2	10,025
3	12,575
4	15,125
5	17,675
6	20,225
7	22,775
8	25,325

For family units with more than eight members, add $2,550 for each additional member. These revised standards are in effect now.

These amounts replace those currently in effect, as set forth in Bltn. No. 1-88, Item 4 (Transmittal No. 257, April 7, 1988).

For additional background and reference material on this subject, please see Bltn. No. 2-86, Item 13 (Transmittal No. 135, May 16, 1986), Bltn. No. 2-84, Item 20 (Transmittal No. 26, July 18, 1984), and references noted therein.

21. Indigent persons, civil court costs: Waiver. Clerk's office personnel are reminded that when a party or his or her attorney files a civil action and includes an affidavit of indigency under G.L. c. 261, s. 27A, and a request for waiver or state payment of "normal fees or costs," there need be no hearing on the affidavit and no appearance by any party or counsel if the affidavit "appears regular and complete on its face and indicates that the affiant is indigent . . . ." Indigency is determined under any of the three tests set forth in G.L. c. 261, s. 27A. In other words, normal fees and costs, e.g. filing fees and surcharges, costs for service of process, etc. (see G.L. c. 261, s. 27A for the full definition), are to be considered waived or chargeable to the Commonwealth without a hearing, as long as facts in the required affidavit conform to any of the three definitions of indigency.

There must be a hearing before a judge only if the affidavit is faulty or the fees and costs involved are "extra" rather than "normal" as defined in s. 27A.

In any event, the filing accompanying the indigency affidavit must be accepted at the time it is made. If the affidavit is rejected following the hearing, there is a procedure for appeal to the Superior Court under G.L. c. 261, s. 27D, and the case will remain on file until and unless the appeal is denied. G.L. c. 261, s. 27C.

Where costs incurred by an indigent person must be paid by the Commonwealth, the procedure for submission of bills and vouchers by the indigent

person to the court for payment is set forth in G.L. c. 261, s. 27G. It is recommended that all Clerk-Magistrates review the statutes, G.L. c. 261, ss. 27A-27G, from time to time with those personnel involved in civil filings.

22. Judges: Advisory opinions on judicial ethics. In Bltn. No. 2-88, Item 10 (Transmittal No. 284, September 23, 1988), I reported the formation of the Committee on Judicial Ethics, which will render advisory opinions to Judges and judicial nominees concerning interpretation of the Canons of Judicial Ethics. The rules of the Commission have now been promulgated, effective March 6, 1989, and are reproduced at pages 27-29.

23. Judges: Insight into the rewards and frustrations of judging. At pages 31-34 of this Bulletin you will find an insightful article from the Summer-Fall 1988 edition of "IJA Report," the newsletter of the Institute of Judicial Administration, New York University. The article summarizes a survey taken by two professors covering the views and opinions of some 100 retired New York state judges concerning their years of service and their post-retirement activities. It is the first such survey I have seen. Many of these views would, I am sure, be echoed by our colleagues here in Massachusetts. I believe the article is as relevant to sitting judges as to those who have retired, and I commend it to your reading.

24. Juries: Alternate jurors in the deliberation room. In Bltn. 4-85, Item 27 (Transmittal No. 104, October 31, 1985), I suggested that alternate jurors should not be permitted to join a deliberating jury in the deliberation room, even under a cautionary instruction not to participate, since the practice appeared to violate Mass. R. Crim. P. 20(d)(2). Comm. v. Smith, 403 Mass. 489, 531 N.E.2d 556 (1988), recently confirmed that such a practice is reversible error. However, the Court noted that its ruling is to be applied only to cases on direct appeal, and is not ground for a collateral attack on past convictions.

25. Juries: Jurors' oath. General Laws c. 233, ss. 17-19, offers jurors and witnesses several alternatives to the usual method of being sworn. Those who conscientiously object to an oath may instead affirm; those who wish to omit reference to the Deity may instead affirm to testify truly under the penalties of perjury.

Jury Commissioner Paul Carr's office recently shared with me a thoughtful letter from a former juror, who pointed to the important heritage behind those provisions:

> Both the United States and the Massachusetts Constitutions offer the choice of swearing or affirming an oath. This allows for Quakers and non-Theists the opportunity to participate in governmental affairs and citizens' obligations without compromise of conscience.

The former juror was aware of, and had wished to take advantage of, these alternatives to the oath. However, the opportunity was never conveniently presented since the venire was sworn collectively, as is usual. The juror wrote:

I was put, by this procedure, in the awkward position of having to either interrupt the solemn proceedings of the court with my own individual concern, perhaps yelled from the back of a large courtroom, or simply to suppress my own agenda. I chose the latter course out of consideration for the sanctity of the court and a desire not to corrupt the atmosphere of a trial with an extraneous matter.

The juror's letter offered two suggestions which are worthy of consideration. Many jurors could be accommodated by routinely modifying the clerk's traditional formulary, so that the venire is asked to "solemnly swear or affirm" to tell the truth. That language is included in the suggested formulary appearing in Appendix V of the District Court's Jury Trial Manual.

Second, jurors might be informed that if they wish to affirm in non-religious language, they need only communicate this privately to a Court Officer upon entering the courtroom. Commissioner Carr's office is recommending that this information be included in the next edition of the Trial Juror's Handbook, which is mailed to each prospective juror. Until that is done, I suggest that judges welcoming jury pools each morning include such an announcement in their remarks to the jurors. Court Officers can then point out such jurors to the judge privately.

26. Landlord-tenant: Late filing in summary process not permitted. Complaints have been received concerning policies in some courts on the entry of summary process cases. Please note that under Rule 2(c) of the Uniform Summary Process Rules, entry dates for summary process actions must be on a Monday. Plaintiffs must pick a Monday and must make service no later than seven days before that date and no earlier than 30 days before that date.

The hearing date that the plaintiff must specify on the summons is determined with reference to the Monday entry date that the plaintiff chooses. The required case papers must be filed by the plaintiff no later than the close of the Monday entry date; late filing by the plaintiff cannot be permitted unless the defendant or defendant's counsel assents in writing. This is expressly provided in Rule 2(e).

Cases that are not filed on time (and in which the defendant does not assent to late filing in writing) cannot be legally "commenced," and therefore the plaintiff must begin again with a new Monday entry date, a new computation of a trial date and new service of the summons and complaint. In such instances, no new filing fee is required because the original filing cannot be accepted.

27. Landlord-tenant: Mandatory minimum damages in housing cases. The Appellate Division recently affirmed that when a residential plaintiff prevails on a claim that his or her landlord has violated the "basic utilities and quiet enjoyment" statute, G.L. c. 186, s. 14, the Judge has no discretion to deny the plaintiff the mandatory minimum recovery provided by statute: a minimum of three months' rent or actual damages, whichever is greater, plus costs and attorney's

fees. Acevedo v. Russell, 1989 Mass. App. Div. 8 (N. Dist.)

Mandatory minimum damages are also required for certain security deposit violations. General Laws c. 186, s. 15B(7) requires the Judge to award a prevailing residential tenant three times the amount of the security deposit, or balance thereof, plus 5% interest from the date due, plus costs and attorney's fees, when the landlord has failed to bank the security deposit as statutorily required (s. 15B[6][a]), failed to transfer it as statutorily required upon selling the property (s. 15B[6][d]), or failed to return it, with interest and minus any deduction for repairs, within 30 days (s. 15B[6][e]). The plaintiff's entitlement to this minimum award is not dependent on the landlord's bad faith or wilfulness. Mellor v. Berman, 390 Mass. 275, 278-283, 454 N.E.2d 907, 910-913 (1983); Buckley v. Daly, 1983 Mass. App. Div. 291, 292 (N. Dist.)

Judges should be familiar with both of these statutory provisions. Whether accurate or not, tenants' attorneys sometimes report that these mandatory minimum awards are not always observed.

28. Law related education: ABA award. The American Bar Association has awarded the District Court LRE Program a Law Day Public Service plaque in recognition of a television program produced in cooperation with WBZ-TV Channel 4, the Lawrence District Court and Lawrence High School. The television talk show for high school students, "Rap Around," included a mock trial written and coproduced by LRE Coordinator Robert Clayman and featuring Lawrence District Court Justice Isaac Borenstein. After the trial was taped at the courthouse, Judge Borenstein visited the studio where the 30-minute program was taped with host Tom Bergeron and 25 students. The show was one of 70 entries from across the country. Plaques have also been awarded to the Lawrence District Court and Lawrence High School.

29. Legislation: Annual notice on filing. At pages 35-39 of this Bulletin is the annual notice from the Supreme Judicial Court regarding the long standing Judicial Conference policy on filing legislation, which essentially requires the submission of a copy of legislative proposals to the Supreme Judicial Court and to the Chief Administrative Justice for purposes of information. If you have caused such bills to be filed in this legislative session, you should be certain that you have complied with the provisions of this policy.

30. Mental health: Civil commitment hearings at Metropolitan State Hospital. Pursuant to G.L. c. 218, s. 43A, I am authorizing civil commitment hearings for persons already committed to Metropolitan State Hospital in criminal cases under G.L. c. 123, s. 12, to be conducted at the hospital by the Judge assigned to sit there. These are hearings that would otherwise have to be conducted at the court where the criminal case is pending.

This authorization requires that counsel for the defendant in the pending criminal case either be appointed for the commitment proceeding or be notified of that proceeding. The Judge sitting at the hospital must ensure that such notification is given.

In these cases the Judge sitting at Metropolitan State Hospital is acting as a Judge of the court at which the hearing would otherwise have to be held. Therefore, a copy of all papers and records in the proceeding must be filed at the latter court. The sitting Judge should also keep a copy of such papers.

The Judge sitting at the hospital can decline to hear such cases if, in his or her opinion, delay in conducting the hearing will be unreasonable. In such cases the petitioner should be referred to the court where the criminal action is pending.

31. Mental health; Civil commitment hearings, clinicians qualified for independent examinations. A recurring problem has been the difficulty encountered by counsel in obtaining the services of independent experts to examine and possibly testify on behalf of persons who are the subject of civil commitment proceedings.

The Mental Health Legal Advisors Committee (MHLAC), through its Executive Director, has advised us that a training program has been developed to train psychologists and social workers in the relevant law in order to develop this important resource. While evaluations for competence and criminal responsibility in criminal cases must be conducted by psychiatrists and psychologists, social workers and other mental health clinicians can serve as expert witnesses on mental health issues if they are found qualified as such by the court.

If counsel indicates difficulty in obtaining an expert, the court can refer him or her to the list of trained clinicians provided by MHLAC, which can be found at pages 41-45. However, use of the list should in no way imply "pre-approval" of the clinician as an expert. Any questions regarding use of the list or the training given to those listed can be referred to MHLAC at 617/723-9130.

32. Mental health; Committee work progresses. Under the able and energetic leadership of its Chairman, Hon. Maurice H. Richardson, the District Court Committee on Mental Health and Mental Retardation has recently completed a draft of revised and expanded Standards for Civil Commitment. The new standards update and greatly expand upon the existing civil commitment standards published in 1979, and are moving to completion. The Committee has also begun work on an entirely new set of standards for medical treatment authorization ("Rogers") hearings.

The members of the full Committee, in addition to Judge Richardson, are Hon. Charles E. Black, Hon. Andrew J. Dooley, Hon. Joseph A. Grasso, Hon. Robert J. Kane, Hon. Daniel F. Toomey and Hon. Elliott L. Zide. Also serving on the Committee are Robert A. Fein, Ph.D., Assistant Commissioner, Division of Forensic Mental Health, Department of Mental Health; Richard Ames, General Counsel, Department of Mental Health; Kim Murdock, General Counsel, Department of Mental Retardation; June Binney, Supervising Counsel, Bridgewater State Hospital; Stan Goldman, Executive Director, Mental Health Legal Advisors Committee; George Lemelman, Esquire; Clyde Bergstresser, Esquire; and Attorney

Steven J. Swartz, Center for Public Representation.

I know that we all look forward to the work products currently being prepared by this active group.

33. Motor vehicles: Discovery in CMVI's. In Comm. v. Kinstler, 1988 Mass. App. Div. 169 (W. Dist.), the Appellate Division has held that the discovery provisions of Dist./Mun. Cts. R. Civ. P. 34 are unavailable to parties engaged in civil motor vehicle infraction hearings, since the civil rules are inapplicable to CMVI's. The Appellate Division went on to suggest:

> Though no discovery rule has been promulgated to apply to motor vehicle infraction proceedings, it is recognized that courts do possess inherent discretionary power "to do justice." Consequently, in particular cases, court discovery direction and guidance would be proper to encourage "voluntary discovery" by joint party participation. Any arbitrary and unreasonable refusal to cooperate would warrant an order of Court accordingly. Such order, however, should be employed sparingly and only in those cases that clearly demonstrate probable prejudice if sought after data or information is absent or not forthcoming.

It appears to me that this strikes the right balance in this area. Because of the informal nature of CMVI hearings, the general practice should be that "[n]o discovery shall be allowed except upon good cause shown," as Uniform Small Claims Rule 5 provides for small claims. However, occasionally advance discovery may be essential to the fairness of the hearing. (One example some have suggested is the situation where advance access to the prosecution's expert accident reconstruction report is crucial to structuring a defense.) In such extraordinary situations, a Clerk-Magistrate may wish to encourage voluntary discovery or, if necessary, refer the matter to a Judge for a potential discovery order.

34. Motor vehicles: Registry abstract entry on jury session default. When a defendant fails to prosecute his or her de novo appeal in the jury session, and the court enters a default and imposes the primary court's sentence under G.L. c. 278, s. 24, the Registry abstract from the jury session should not refer to a "default." Rather, the entry on the abstract should just be "G" for guilty. This reflects the primary court guilty finding that is reinstated when the defendant fails to appear in the jury session.

Also, remember that the primary court must send in to the Registry an abstract marked "G" following the primary court finding, notwithstanding the taking of a de novo appeal.

35. Motor vehicles: Registry fees for removing defaults and reinstating licenses. The Registry of Motor Vehicles has instituted two new administrative fees. Motorists are now charged $30 to reinstate a suspended license, and $10 to remove a court default. Depending on the circumstances, a motorist may be charged either or both fees. They are authorized by 801 Code Mass. Regs. ss. 4.02(17) and 4.02(58), as published at 601 Mass. Register 38 (February 3, 1989).

The Registry does not assess the $30 license reinstatement fee after license suspensions under G.L. c. 90, s. 24N (the "per se" law) or s. 24D dispositions (first-offense OUI dispositions with "the program"). The $30 license reinstatement fee, and where applicable the $10 court default removal fee, are required in all other situations.

This means, for example, that when defendants convicted of second-offense OUI have completed their 2-year period of license suspension (see s. 24[1][c][2]), the Registry will require them to pay the $30 fee to the Registry before reinstating their licenses. The reinstatement fee is also assessed on suspensions that are Registry-commenced, e.g. the 120-day license suspension for refusing the breathalyzer (s. 24[1][f]).

These Registry fees apply also to civil motor vehicle infractions. Once a Clerk-Magistrate reports a motorist to the Registry as having defaulted on a CMVI and the Registry sends out a letter threatening license suspension at the end of 30 days, the Registry will require the motorist to pay the $10 "default removal" fee. If the motorist does not bring in the court's certificate of compliance (the "green slip") to the Registry within those 30 days and the suspension goes into effect, the Registry will then require the motorist to pay both the $10 "default removal" fee and the $30 "license reinstatement" fee--a total of $40.

(Note that these Registry-collected fees are separate from the late charge of $15 ($25 for multiple CMVI's) that G.L. c. 258B, s. 8 requires the court to assess, collect and deposit to the Victim-Witness Fund on CMVI citations that are not returned to the court within 20 days.)

Normally the courts have no direct involvement with these $10 and $30 fees, since they are assessed and collected by the Registry itself. However, occasionally a Clerk-Magistrate will want to ask the Registry to waive the fees because the court erred in requesting the suspension, e.g. when it is discovered that the court failed to record its timely receipt of a motorist's payment for a CMVI citation. The "green slip" alone is not sufficient to obtain such a waiver, but the Registry will waive its fees if, along with the "green slip," the motorist presents the Registry with a letter from the Clerk-Magistrate asking that the fees be waived because of court error. Such requests should be limited to such (hopefully infrequent) circumstances, where they are obviously appropriate.

36. Motor vehicles: Some reminders on CMVI hearings. With the Legislature's increase in speeding assessments has come an increase in the number of civil motor vehicle infraction hearings, and a heightened awareness of their importance. Clerks and Assistant Clerks who sit as Magistrates on these hearings are urged to review closely Trial Court Rule VII and District Court Administrative Regulation 3-86, which govern the procedures for such hearings. These hearings can involve a good deal of tension and emotion and often impose a heavy burden on the Magistrate in terms of patience and professionalism. Some reminders on matters that seem to arise frequently:

(A) Communicating with waiting motorists. As we all know, nothing is more frustrating than waiting in line without knowing when one will be reached. It is a matter of both courtesy and importance to the public that motorists who appear at court for a Magistrate's hearing be kept informed about when their case is likely to be reached. If hearings are delayed or interrupted for good reason, waiting motorists should be told the reason.

(B) Impartial setting. As with any court proceeding, the setting of the hearing should reassure both parties that they are appearing before a neutral and detached Magistrate. I sometimes hear from motorists who say they were dismayed to walk into the hearing room to find the Magistrate and the officer drinking coffee together and engaged in what the motorist perceives as socializing. Since motorists approach their hearings sensitive that they lack the familiarity that police have with court facilities, procedures and personnel, Magistrates should make every effort to project a reassuring atmosphere of detached neutrality.

(C) Citing officer's presence. As I informed the courts on January 6, 1989 (Transmittal No. 291), the Appellate Division has ruled that a Magistrate is required to find a motorist not responsible if the citing officer fails to appear at the Magistrate's hearing. That decision, Town of Reading v. Murray, 1988 Mass. App. Div. 193 (N. Dist.), is presently on appeal to the Supreme Judicial Court, and was argued before the Court on April 6, 1989. We will inform you as soon as the court issues a decision.

(D) Burden of proof. The manner in which the hearing is conducted should demonstrate the Magistrate's awareness that the burden of proof is on the Commonwealth, not the motorist, and that the Commonwealth will prevail only if it has a preponderance of the credible evidence, i.e. that it proves that the charge is more likely true than not. Normally it is best to announce this explicitly at the beginning of the hearing, and then to require the police to present a "case" before inviting the motorist to respond. Such a manner of proceeding makes it clear that this is not a discussion or a negotiation, but a judicial hearing, albeit under relaxed rules of evidence.

Every Judge and Magistrate knows how difficult it is to explain that a witness's self-interest is an appropriate factor to consider in assessing credibility, without the motorist thinking that he or she is being accused of untruthfulness. But diffidence or politeness should not lead a Magistrate to adopt an attitude that the motorist could fairly interpret as an automatic presumption for the police, regardless of the evidence presented.

Any considerations that do not relate to the evidence must be ignored. Although the proceedings are relatively informal when compared to a criminal hearing or trial, they are judicial in nature. The merits of a pending citation should not be discussed except at a hearing and in the presence of both parties. This includes any attempted contacts from anyone. Such ex parte contact is improper and can only compromise the integrity of the Magistrate's independent, neutral role.

(E) Available dispositions. The statute, the rule and the administrative

regulation are explicit that there are only two permissible outcomes to a CMVI hearing before a Magistrate or Judge: a finding of "not responsible," or a finding of "responsible" with imposition of the required assessment. (A Judge also has discretion to file a CMVI when it accompanies related criminal charges.) No other outcome is permissible. Specifically, a Magistrate may not dismiss a CMVI upon payment of costs, or upon a charitable donation, or file a CMVI or continue it without a finding, or utilize any other form of alternate disposition that avoids the required choice between "responsible" and "not responsible."

Disregard of this requirement can bring embarrassment and engender public disrespect. It has already happened that some motorists given an unlawful alternate disposition viewed it not as a "break" but as "splitting the difference" between the officer and the motorist instead of rendering the outright "acquittal" to which the motorist believed himself entitled. In any event, such alternate dispositions are not lawful.

(F) Failure to prove the rate of speed as charged. Since assessments for speeding now vary with the number of miles over the speed limit, if the police fail to prove the rate of speed as charged but do prove some lesser speed still in excess of the speed limit, the Magistrate can (and must) find the motorist responsible only for that "lesser included" speed and impose the assessment corresponding to the rate of speed that was proved. As I discussed in my memorandum of August 11, 1988 (Transmittal No. 279), this is not akin to a discretionary reduction in the assessment which is prohibited in speeding cases by Administrative Regulation 3-86, but merely a corollary of the Magistrate's obligation to enter a finding and impose an assessment that accords with the facts as proved.

When this situation occurs, the Magistrate should always explain to the motorist what has happened, so that he or she understands why a lesser assessment is being imposed than that shown on the citation. I sometimes hear from motorists who take a Magistrate's failure to explain as a silent admission that he has improperly "split the difference" between the officer and the motorist. A note of the reason for the reduced finding and assessment must also be made on the court copy of the citation, which serves as a docket, for the benefit of auditors and others who may inquire.

(G) Revised distribution of speeding assessments collected. Clerk-Magistrates are reminded that, effective April 1, 1989, any assessments collected for speeding violations must be distributed one-half to the State Highway Fund and one-half to the municipality where the violation occurred. (St. 1988, c. 273, amending G.L. c. 280, s. 2).

As indicated in my original notice of the change (Transmittal No. 290, December 27, 1988), the change appears to apply to all assessments collected on and after April 1, 1989, regardless of when the citation was issued or the finding of responsible was made.

37. Personnel: Giving recognition. While there are few opportunities for giving special financial recognition to employees in the Trial Court or in

government generally, we would all do well to take advantage of those daily opportunities to recognize and reward in a non-financial way good performance by court employees. In this regard you will find on pages 47-50 some material on this subject: guidelines for giving recognition, and some specific alternative ways to reward performance. This is taken from materials of the Department of Personnel Administration in the Executive Branch, and while not all of the suggestions are directly relevant to the courts, the same principles apply.

38. Probation: Day Supervision Fees in Cases Transferred to Jury Sessions. In the "Interim Standards Regarding Probation Fees," issued by the Commissioner of Probation, August 4, 1988, it is stated at paragraph 1.01 that

> [t]he probation officer at the time of arraignment, shall complete the "Probation Supervision Fee Assessment Report" (RA 62-PSF-1 attached), shall verify the information regarding support orders and restitution prior to disposition and shall verify the offender's daily net wages within fourteen (14) calendar days after disposition.

In cases sent to jury sessions on claims of first-instance jury trial (and in all cases going to jury sessions in Essex and Hampden Counties), the referenced form, completed at the primary court, will enable the probation department in the court where the jury session is located to advise the court regarding imposition of the fee, or waiver of the latter in favor of a work service placement.

Depending on the passage of time, the form might have to be updated prior to disposition at the jury session.

Prompt return of the case to the primary court will enable the probation department there to begin collection of the fee or to make the actual placement, as the case may be.

The decision on imposing the fee or work service placement, as required by law, and the amount of the fee, is the responsibility of the Judge making the disposition in the jury session.

39. Search warrants: Public access to search warrants and affidavits. In a recent case, Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Div. of the Dist. Court Dep't, the Supreme Judicial Court held that both G.L. c. 276, s. 2B and the common law grant the public a right of access to search warrants and their supporting affidavits once the warrant has been served and returned to the court. Thereafter, a Clerk-Magistrate may deny public access to a search warrant and its supporting affidavit only if a Judge has issued an impoundment order supported by specific findings, balancing the factors that have been held relevant to the propriety of impounding court papers.

On the facts of this case, the S.J.C. upheld the Appellate Division's affirmance of a District Court Judge's impoundment order, based on her specific findings that its disclosure would endanger the defendant's Sixth Amendment right to an impartial jury in a murder case arising in a small rural community, where the murder, the year-long investigation and the defendant's arrest had received extensive media coverage. Since the defendant's trial is now over, the S.J.C. also ordered the impoundment order dissolved.

40. Sentencing and dispositions: Community work service and liability issues. The Legislature's decision to require probationers to pay a probation fee or, if they are indigent, to perform substitute community work service (St. 1988, c. 202, s. 27; see also my memorandum of August 11, 1988, Transmittal No. 279) has revitalized some longstanding questions about the liability issues surrounding community work service by probationers.

At least one of those issues appears to have been answered. At the Trial Court's request, the Department of Industrial Accidents has considered the applicability of workers' compensation to probationers performing community work service. On February 8, 1989, the DOIA rendered an opinion that such probationers would not fall under the workers' compensation jurisdiction of the DOIA because they do not meet the definition of "employee" in G.L. c. 152, s. 1 ("a person in the service of another under any contract of hire, express or implied, oral or written"). The opinion was based in part on the rationale of Greene's Case, 280 Mass. 506, 182 N.E. 857 (1938), that a convicted, incarcerated prisoner who is injured while performing manual labor is not an "employee" for workers' compensation purposes.

Attorney Paul Gariepy, the contract specialist in the Trial Court's legal department, has developed a simple, model Memorandum of Understanding which courts can use to clarify the implicit obligations of community work placement sites with respect to supervision, confidentiality, reporting and liaison personnel.

Copies of the DOIA's opinion letter and the model Memorandum of Understanding are available from Mike Shea of this office.

41. Sentencing and dispositions: No sentencing to Braintree Alternative Center. The Braintree Alternative Center was created as a temporary, minimum security correctional facility for Norfolk County under St. 1987, c. 109, effective June 2, 1987. However, that law expressly provides that "[n]o court of the commonwealth shall sentence any person to said center." Only the Sheriff of Norfolk County can place prisoners in the Center, after consulting with the Police Chief of Braintree and in accordance with county guidelines. Thus, courts should not attempt to commit directly to the Braintree Alternative Center.

42. Sentencing and dispositions: Study on female offenders. A report entitled "The New Female Offender" has been released by the office of the Commissioner of Probation. This report, which was sent to all Chief Probation Officers, summarizes the findings of a study which focussed on 7,444 adult offenders who committed street level offenses, and who were subsequently placed

on risk/need probation supervision in the Superior, District and Boston Municipal Courts between July 1, 1987 and February 29, 1988. Of this total, 14%, or 1,009 probationers, were female offenders. The study was designed to elicit profile information on these women.

When comparing adult female offenders with adult male offenders, the study found that the female offenders were generally older than male offenders, became involved in criminal activity later in life, were less likely to have had a prior court appearance within the past five years, and were more likely to primarily abuse drugs than alcohol, whereas males were more likely to primarily abuse alcohol. Both groups were found to have a serious substance abuse problem. Females were more likely than males to be on probation for property offenses and for controlled substance offenses, and less likely for violent offenses. Ninety percent of the females and 85% of the males were on probation for committing one of these three types of offenses.

When comparing female offenders in the Superior Court with those in the District Court, the study found that the Superior Court's female offenders were on average older, more likely to have made their first court appearance after 24 years of age, and less likely to have had a prior court appearance within the past five years. In addition, drug offenders were the primary offender group in the Superior Court, while property offenders were the primary group in the District Court.

On average, females who committed violent crimes were 26 years old, significantly younger than all other female offenders, and had made their first court appearance at a significantly younger age than other female offenders. By contrast, females who were drug offenders were, on average, older than all other female offenders, made their first court appearance significantly later in life, and were least likely to have had a prior court appearance within the past five years.

These are only some of the findings of the study. The full report goes further into employment history, education levels, family relationships, and other relevant areas. The information demonstrates that the "typical" female offender cannot be stereotyped, and that these persons have a wide range of characteristics, needs, strengths and weaknesses. The information contained in the study should be valuable in assessing resource needs and allocating those resources for the supervision, treatment and rehabilitation of female offenders.

43. Support enforcement: Increased support collections. Final support collections figures for calendar year 1988 have now been tallied. According to statistics collected by the Commissioner of Probation, the District Court collected over $53.2 million in support payments. Approximately half of this money was collected on behalf of the Department of Public Welfare. The other half consisted of non-welfare and interstate payments.

The true measure of this success can be demonstrated by a comparison with past years, as shown below:

Year	Amount collected (in millions)	Change from previous year
1985	$32.6	
1986	$36	11.57%
1987	$42.3	11.57%
1988	$53.2	17.3%
		25.7%

Thus, not only have dollar amounts continued to climb, but the rate at which the increase is occurring is continually rising. A great deal of credit is due to probation staff who have continued, despite limited resources and unfilled vacancies, to monitor and enforce court orders for support, and to collect this high volume of payments. As "court conversion" progresses and these responsibilities are assumed, on a court-by-court basis, by the Department of Revenue (see Bltn. No. 2-88, Item 9, Transmittal No. 284, September 23, 1988), some relief should be forthcoming.

44. Support enforcement: 60-day notice of criminal case dismissals. Under the cooperative agreement entered into last May by the Trial Court and the Department of Revenue (DOR), courts are required to provided advance notice to DOR before dismissing a criminal non-support case. This is to allow them an opportunity to object, to provide notice so that they may reconcile their arrearage figures, or to permit them to refile the case as a civil matter before the order expires. Judges and Probation Officers are asked to keep this requirement in mind when dismissing, or recommending the dismissal of, such cases. (For more on the cooperative agreement, please see Bltn. No. 2-88, Item 9 and pp. 19-21, Transmittal No. 284, September 23, 1988.)

45. Support enforcement: New address and phone number for DOR/IEB. The Department of Revenue's Interstate Enforcement Bureau (IEB) was established in 1987 to serve as a clearinghouse, or central registry, for interstate child support activity in IV-D cases. Although not yet fully operational, the Bureau will eventually be responsible for all such activity, including full case management, collection, monitoring and enforcement responsibility, certifying cases for tax intercept, and representation of non-resident petitioners in Massachusetts-responding cases in both URESA and interstate income withholding actions. The Bureau has, in fact, begun to assume some of this responsibility on a limited basis.

In Btn. No. 7-87 (Transmittal 225, October 26, 1987), courts were advised of the IEB's assumption of these duties in the context of interstate income withholding actions. An address and telephone number for the IEB were provided. However, both of these have changed. The correct address is as follows:

Department of Revenue
Interstate Enforcement Bureau
215 First St.
Cambridge, MA 02142

In addition, a direct line for court personnel only has been established. This number is 617/621-4629. Other individuals should be directed to call 617/

621-4653 for information and assistance.

The IEB has been very cooperative in assisting court personnel with questions, problem cases, and difficulties in dealing with other states, and in providing correct forwarding addresses for outgoing URESA's. You should feel free to seek their assistance should you require it.

46. Warrants: Oral search warrants or arrest warrants invalid. The Appeals Court's recent decision in Comm. v. Curcio, 26 Mass. App. Ct. 738, 745, 532 N.E.2d 699, 703 (1989), included a reminder that a Magistrate cannot validly authorize a search warrant orally, with a promise of documentation to follow later when time permits. The same rule was earlier articulated in Comm. v. Fredette, 396 Mass. 455, 458, 486 N.E.2d 1112, 1115 (1985), with respect to arrest warrants. Such "oral" search warrants or arrest warrants are invalid and should not be issued.

Samuel E. Zoll
Chief Justice
District Court