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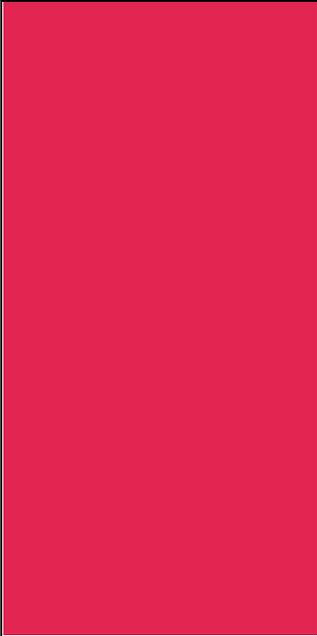
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A Hill to Climb: Our Fight Against the Heroin Epidemic

by Attorney General Maura Healey



Special Feature

At the foundation of my campaign for Attorney General were the values I learned from the colleagues, mentors, and organizations I worked with throughout my legal career – a belief in the power and the possibility of the law, and of a lawyer’s work. When I was elected, I pledged to be the people’s lawyer. Today, my office stands ready to live up to that pledge and to fight for and protect all Massachusetts residents.

The issue front and center for me and my team right now is the opioid and heroin epidemic. It’s an unprecedented public health crisis unlike anything we’ve seen before.

Addiction is a disease that does not discriminate. It affects people from all walks of life.

Four out of five heroin users report having started with prescription drugs. Whether it’s the son of a high school football coach who injured his knee or the brother who broke his wrist while serving in the Navy, I’ve heard hundreds of stories from people struggling with this disease.

In a recent report, the Department of Public Health estimated that more than a thousand people in Massachusetts died from opiate-related overdoses in 2014 alone. This represents a 33 percent increase in overdose deaths in the Commonwealth since 2012.

My office is aggressively pursuing a multi-pronged approach to address this epidemic. We’re looking at all the practices that got us here – from pharmaceutical marketing, to overprescribing, to pharmacy dispensing, to insurance coverage.

We’re investigating sudden increases in the price of Narcan, a life-saving drug that stops overdoses, and recently worked with the Massachusetts Legislature to set up a Narcan bulk purchasing fund, so first responders can more affordably buy the drug.

We're working to remove barriers to treatment and help ensure access to high quality care for opioid addiction. In April, we sued a drug treatment center we believe was seeking to profit off this epidemic by unlawfully charging MassHealth patients in cash for medication-assisted treatment. In May, we indicted a Hyannis doctor who we allege was illegally prescribing opioids to patients with known addictions. And we are currently in the middle of investigating several other medical practices for similar unlawful and fraudulent activity.

At the same time, we need real, meaningful reforms in the criminal justice system to address the fact that the vast majority of people appearing in our criminal courts and in our correctional facilities present with addiction and mental health challenges. Here a few of the reforms that I support.

It's time to eliminate mandatory minimums for certain drug crimes. What some people need is a treatment bed, not a jail.

According to the Centers for Disease Control, 80 percent of inmates in correctional facilities have substance abuse issues. Here in Massachusetts, the numbers appear to be just as high. The Suffolk County Sheriff reports that 85 percent of the inmates in his custody are committed for issues stemming from substance abuse.

Incarceration alone is not solving this epidemic, and it is very costly. We spend approximately \$47,000 a year to house each inmate in our Department of Corrections.

My office is committed to engaging in conversations with stakeholders and the Legislature and will play an active role in the Massachusetts Sentencing Commission that was reestablished last year to evaluate sentencing structures.

I also support a thorough review of how Massachusetts currently spends its correctional dollars, with an eye toward keeping at-risk young people in school, investing in reentry programs and creating opportunities for job training.

We need to shift the lens by increasing our focus on prevention, intervention and treatment, reducing barriers for those coming out of correctional facilities, and updating our statutes to avoid disproportionate punishment. And we need to work together to address the disease of addiction.

As the people's lawyer, there is no challenge too big or too complicated to take on. It is my duty to serve and protect the people of Massachusetts and I will do so by tackling this epidemic using all of the resources made available to me. I ask you to join me in this fight.

Maura Healey is the first new attorney general of Massachusetts in eight years. A former prosecutor in the Office of the Attorney General, Attorney General Healey served as Chief of the Civil Rights Division and

directed the Public Protection & Advocacy Bureau and the Business & Labor Bureau. She is well known for her work in leading the nation's first successful challenge to the Defense of Marriage Act (DOMA).

Sentencing Reform

by Chief Judge Patti B. Saris



Voice of the Judiciary

Sentencing reform is now at the center of debate in Massachusetts. A reconstituted Massachusetts Sentencing Commission is reviewing state sentencing guidelines. Chief Justice Gants of the Supreme Judicial Court has called for the elimination of mandatory minimum sentences for drug crimes. The debate is a welcome development. I come to this judgment from my experience not only as a trial judge of thirty years in the Commonwealth and in the Federal Courts, but also as the Chair of the United States Sentencing Commission. I write on my judicial perspective on mandatory minimum sentences with the hope that the federal experience with mandatory minimums and guidelines will be helpful in the state's reform discussion.

In 2011, the United States Sentencing Commission, an independent, bipartisan agency, unanimously reported to Congress that current mandatory minimum penalties, particularly for drug offenses, contribute to growing prison populations and can lead to unfair results. In the past several years, the Commission has prioritized reducing incarceration costs and prison overcapacity. Last year, the Commission reduced drug penalties and made that change retroactive, making up to 40,000 incarcerated offenders eligible for early release by an average 25 months.

The Commission's 2011 report to Congress on mandatory minimum penalties determined that some mandatory minimum provisions apply too broadly, are set too high, or both. The Commission found that their use, particularly in the drug context, contributed significantly to over-incarceration. The Federal Bureau of Prisons is more than 38 percent over-capacity. Federal prisons and detention pending trial cost well over \$6 billion a year and account for about a quarter of the overall Department of Justice budget. This means fewer resources for law enforcement and other key public safety programs. The number of offenders in federal prison convicted of an offense carrying a mandatory minimum penalty increased from 40,104 offenders in 1995 to 111,545 in 2010, an increase of 178.1 percent. Drug offenders currently make up 51 percent of those in federal prison and comprise the majority of those offenders subject to mandatory minimum penalties.

The Commission found that certain severe mandatory minimum sentences lead to disparate charging decisions by prosecutors and to vastly different sentences for similarly situated offenders. These differences were particularly acute with respect to filing notices under section 851 of title 21 of the United States Code for drug offenders with prior felony drug convictions, which generally doubles the applicable mandatory minimum sentence. In some districts, filing was routine. In others, it was more selective, and in one district it was almost never filed at all.

We further found that, in the drug context, mandatory minimum penalties often resulted in severe sentences for lower-level offenders, rather than just for the high-level drug offenders who it appears Congress intended to target. For example, a courier may be carrying a large quantity of drugs, but may be a lower-level member of a drug organization. The Commission found that 23 percent of all drug offenders were couriers, and nearly half of these were charged with offenses carrying mandatory minimum sentences. The category of drug offenders most often subject to mandatory minimum penalties at the time of sentencing were street-level dealers, who were many steps below high-level suppliers and leaders of drug organizations.

In addition, Black offenders were much less likely to get “safety valve” relief from mandatory minimum penalties than other offenders and therefore were more likely to remain subject to those mandatory minimum penalties. Only about 14.4 percent of Black offenders qualified for safety valve relief compared to 46.3 percent of Hispanic offenders and 39.5 percent of White offenders. This difference is largely attributable to the criminal history of Black drug offenders. About three quarters of Black drug offenders convicted of a drug offense carrying a mandatory minimum penalty had a criminal history score of more than one point under the sentencing guidelines, which disqualified them from application of the safety valve.

Significantly, the Commission has found that, in at least some circumstances, modestly reducing drug sentences did not make it more likely that people would commit new crimes or less likely that they would plead guilty or cooperate with authorities. Crack cocaine offenders we studied, who were released in 2008 after having their sentences reduced by more than two years because of an amendment to the sentencing guidelines, had a 30.4 percent recidivism rate. The group of similarly situated offenders who had served their full sentences had a 32.6 percent recidivism rate.

Moreover, the overall rates at which these defendants pleaded guilty remained relatively stable after crack cocaine penalties were reduced. In the fiscal year before the 2008 amendment took effect, the plea rate was 93.1 percent, and in the two consecutive fiscal years following effect, the plea rate was 95.2 percent and 94.0 percent. Similarly, in the fiscal year before the amendment took effect, the overall rates at which crack cocaine defendants received substantial assistance departures for their cooperation with law enforcement was 27.8 percent, and in the two consecutive fiscal years afterward, the substantial assistance departure rate was 25.3 and 25.6. Thus, while some prosecutors have worried that reducing drug penalties would affect the incentive to cooperate, this reduction did not appear to have that result.

While there was a spectrum of views among the Commissioners as to whether mandatory minimums are a good idea, the Commission has unanimously recommended statutory changes to reduce and limit mandatory minimum penalties. These recommendations include the following:

- Congress should reduce the length of current mandatory minimum penalties for drug trafficking.
- Congress should consider expanding the so-called “safety valve,” allowing sentences below mandatory minimum penalties for non-violent, low-level drug offenders, to offenders with slightly greater criminal histories than the currently narrow requirements permit.

Congress is now considering bipartisan legislation consistent with these recommendations. Many states, like California, Texas, South Carolina and others, have recently reconsidered their sentencing policies and been able to reduce prison populations and save money without increasing crime.

It is important to note that while the Commission has recommended reducing the mandatory minimum penalties, it continues to believe that guidelines can reduce unwarranted disparity among judges and increase fairness in sentencing. The federal courts have advisory guidelines that provide a strong anchoring effect in most federal cases. In a 2013 survey of federal district judges, we learned that more than three-quarters of judges prefer advisory guidelines to any other sentencing system — including one with no guidelines.

As a veteran of the Superior Court, I think that the federal experience is very relevant to the current Massachusetts debate on issues of over-incarceration and sentencing proportionality. I believe that the work of the United States Sentencing Commission can help inform that discussion and the urgent need for reform. Fairness and sound public policy are powerful arguments, indeed.

United States District Judge Patti B. Saris is the Chair of the United States Sentencing Commission and the Chief Judge of the United States District Court for the District of Massachusetts. Judge Saris was an Associate Justice of the Massachusetts Superior Court before her appointment to the United States District Court.

Amendments to the Uniform Rules of Impoundment Procedure

by Chief Justice Paula M. Carey and Joseph Stanton



Heads Up

The Supreme Judicial Court has approved amendments to Trial Court Rule VIII, the Uniform Rules on Impoundment Procedure (URIP), which become effective on October 1, 2015. The URIP have not been amended since their adoption in 1986. The newly approved amendments are the product of the Trial Court Advisory Committee on Impoundment Law and Procedure, which recommended many substantive and stylistic changes in order to conform the URIP to case law and to facilitate their use. These amendments include application of the URIP to criminal proceedings, a trade secret exception, and imposition of a duty on filers to notify the court of any filing containing impounded information. Additionally, the committee has issued the *Handbook on Trial Court Rule VIII, The Uniform Rules on Impoundment Procedure* (“*Handbook*”), which contains annotations and guidance for each rule. This article identifies the substantive changes to the newly amended rules.

Rule 1 Applicability and Definitions. Most significantly, the URIP as amended are expressly applicable to criminal proceedings, as well as civil proceedings, in each Department of the Trial Court. Also, the language in the prior Rule 1, which permitted a court to impound the existence of a case from the court’s docket or index, has been deleted.

Rule 2 Motion for Impoundment. Several substantive amendments have been made to conform the URIP to case law. The new Rule 2(a) requires that the movant describe with particularity the reasons why impoundment is necessary, why alternatives are inadequate, and identify the requested duration of the order. It also requires that the movant file a proposed order and findings, as well as an affidavit in support of the motion. Rule 2(a)(3) requires the motion and supporting affidavit to be publicly available unless otherwise ordered. Rule 2(b)(1) mandates that a motion for impoundment must be filed and ruled upon prior to submission of the materials sought to be impounded, unless filed pursuant to Rule 2(b)(2)’s

new procedures for *in camera* review. If the court denies a motion for impoundment after *in camera* review, the movant will have fourteen days to retrieve or file the documents, after which unretrieved materials will be destroyed.

Rule 3 Ex Parte Impoundment. Rule 3 has been substantively amended due to the application of the URIP to criminal proceedings. Rule 3 provides that upon a motion and affidavit, or by the court *sua sponte*, and a showing of immediate and irreparable injury, as well as good cause, the court may enter an *ex parte* order of impoundment for ten days, unless otherwise extended for good cause shown. The court may, but is not required to, hold a hearing before issuing an *ex parte* order of impoundment. Any party or interested nonparty aggrieved by an *ex parte* order may file a written motion to vacate or modify. Rule 3(e) establishes the procedure for filing an *ex parte* motion to impound materials related to the issuance and/or execution of a search warrant, including any motion to modify or terminate such an order.

The Handbook contains examples of common situations when *ex parte* orders are entered, including search warrants containing sensitive investigative information, documents pertaining to an ongoing grand jury investigation, or information the public disclosure of which could compromise a defendant's right to a fair trial or the Commonwealth's interest in the fair administration of justice.

Rule 4 Service. Service of filings under URIP is effected pursuant to the Rules of Civil Procedure. Notably, this continues the current practice of employing essentially the same service methods for civil and criminal proceedings. Rule 4(d) instructs that an interested nonparty's motion to obtain access to impounded documents in a criminal case should be served on the parties and on the Office of the Attorney General (OAG), who shall have an opportunity to be heard on the motion. The movant has the burden to notify the court of the OAG's right to be heard. Rule 4(e) requires that the affidavit of service specify the names and addresses of those served, and the method and date of service.

Rule 6 Involvement of Interested Nonparties. The title of Rule 6 has been amended from "Motion by Third Person to be Heard" to "Involvement of Interested Nonparties." Rule 6 governs the participation of an "interested nonparty," which Rule 1(b)(11) defines as:

[A] person who is not or was not a party to the underlying matter in which an impoundment issue has arisen, but who nevertheless expresses to the court (through a motion, an appearance limited to impoundment, filing, or otherwise) an interest in the impoundment proceeding, or who has been named by the court as a person who shall receive notice.

Rule 6 allows an interested nonparty to request, oppose, modify, or terminate an order of impoundment. The rule sets forth different procedures for pending cases and cases in which a final disposition has been entered.

Rule 7 Hearing. Rule 7 continues the URIP requirement that a hearing shall be held before the court enters an order of impoundment, except as otherwise provided in the URIP. Rule 7(b) adds a non-exhaustive list of factors a court shall consider in determining good cause, including, for instance, balancing in criminal proceedings the public's right of access against the defendant's constitutional right to a fair trial. Whereas the prior version of Rule 7 permitted the court to close the entire hearing if a public hearing would risk disclosure of information sought to be impounded, the new Rule 7(d) authorizes the court to conduct, *in camera*, only that portion of a hearing that may risk disclosure.

Rule 7(e) as amended includes a trade secret exception to the requirement for a hearing. The court may allow a motion for impoundment without a hearing upon a finding of good cause when "(1) the reason for the impoundment is to protect trade secrets or other confidential research, development, or business information, (2) the motion is by agreement or the motion is unopposed, (3) no party or other person has requested a hearing, and (4) the information does not involve an alleged or potential public hazard or risk to public safety."

Rule 8 Order of Impoundment. Rule 8(a) states that "[a]n order of impoundment, whether *ex parte* or after notice, may be entered only upon a written finding of good cause." Rule 8(b) requires the order to identify specifically the material to be impounded, and include a date certain for expiration of the order. Rule 8(c) requires the court to narrowly tailor the scope of the impoundment, and authorizes the court to require the filer to submit a redacted copy for public inspection. Rule 8(d) provides that the order be entered on the docket, kept in the public file, and made available for public inspection. "The order shall provide sufficient information for the public to identify the case caption, the case number, and to ascertain the grounds, duration, and scope of the impoundment. All information stating or disclosing the impounded material shall be omitted or redacted from the order prior to public inspection."

Rule 12 Review. The amendments to Rule 12 are significant, but principally codify existing procedures established by case law. Rule 12 now distinguishes between two procedures for review of impoundment orders, depending on whether the order was entered in "ongoing proceedings" or in "proceedings which have concluded." Under Rule 12(a), applicable to ongoing proceedings, a party or interested nonparty aggrieved by an order entered under the URIP may seek review from a single justice of the Appeals Court, in accordance with the procedures governing single justice practice. Under Rule 12(b), which governs concluded proceedings, challenges to URIP orders must proceed in accordance with the Massachusetts Rules of Appellate Procedure.

Rule 13 Maintaining Confidentiality of Impounded Material. Rule 13 is a new rule. It imposes a duty on the filer of any document to ascertain whether any information in the document has been designated

“impounded” by order, statute, court rule, standing order, or case law. For any such document, Rule 13(b) requires that the filer “shall (i) notify the clerk that impounded information is included within the document being filed; (ii) identify the specific legal authority requiring impoundment of the identified information; and (iii) identify the precise location of the impounded information within the document being filed.” The cover page of the document containing the impounded information must identify that it is impounded. Rule 13(c) imposes upon “all persons” a duty to protect the confidentiality of impounded materials, and prohibits the unnecessary disclosure of impounded information at hearings, trials or in written filings. Rule 13(d) states that the inadvertent filing of a document containing impounded information does not waive the confidentiality of the information. In such instances, any party may file a motion to strike such material from the record, or the court may act *sua sponte* to strike the material and/or order it refiled with the appropriate notice and any necessary redaction.

Handbook. The Handbook, in addition to annotations and guidance as to each rule, contains sections intended to promote uniformity and consistency in the administration of URIP filings and orders, and in the clerk’s handling of impounded materials. The Handbook also contains a sample impounded notice form for filers, a sample order form for the court, and a list of Massachusetts authorities that designate certain information as impounded, confidential, or not available for public inspection.

The full text of the amended URIP is **posted on the Judicial Branch’s website**, including the Handbook which, thanks to the efforts of the Trial Court Law Libraries personnel, contains hyperlinks to the referenced authorities. Also, as of the time of submission of this article, the Appeals Court **has posted for public comment** proposed amendments to its Standing Order Concerning Petitions to the Single Justice, which will govern the filing requirements for a petition for review of an impoundment order, pursuant to URIP Rule 12(a). In addition, the Supreme Judicial Court has **proposed amendments to S.J.C. Rule 1:15**, which governs impoundment procedure in the appellate courts. It is anticipated that these amendments will become effective on October 1, 2015, the effective date of the amendments to Trial Court Rule VIII.

Trial Court Chief Justice Paula Carey and Appeals Court Clerk Joseph Stanton are co-chairs of the Trial Court Advisory Committee on Impoundment Law and Procedure.

The Superior Court Looks Ahead

by Chief Justice Judith Fabricant



Voice of the Judiciary

In 2009, the Superior Court celebrated “150 Years of the Rule of Law,” on the occasion of the 150th anniversary of the Court’s founding in 1859. We held educational programs, historic reenactments, and a symposium; we posted exhibits that continue to enliven jury assembly rooms and public spaces; and we published a book of essays reflecting on the experiences of some fifty members of the Court. We undertook these observances in recognition of our proud history of providing justice in the broad range of matters that come before us.

Today, while we remain fully committed to our original mission, we recognize that to serve effectively under current and future conditions, we must change. Change is everywhere around us, and we can be no exception.

The Trial Court Strategic Plan, adopted in 2013, describes a vision for a court system fitting the needs and circumstances of the 21st century, providing fair and expeditious resolution of all types of disputes, in safe and dignified settings, and making full use of technology and of a committed and well-trained workforce. The Strategic Plan sets nine goals to reach that vision, three of which warrant particular attention in the Superior Court: (1) to preserve and enhance the quality of judicial decision-making; (2) to deliver justice with effectiveness, efficiency, and consistency; and (3) to improve access.

Quality judicial decision-making is the most essential feature of any court. The Superior Court has a long history of quality, including in the most serious and challenging cases. That is part of why so many outstanding lawyers regularly seek appointment to the Superior Court.

The judges of the Superior Court, with support from the Trial Court Judicial Institute, provide an invaluable resource for each other in enhancing quality. We operate a comprehensive set of professional development programs for colleagues at all levels of experience, including a structured orientation and mentoring program for new judges, as well as formal and informal educational programs for all.

We are now placing particular emphasis on peer observation, in which judges observe each other in the courtroom and give confidential feedback. As of this writing, 65 of the 78 sitting judges of the Superior Court have arranged pairings for on-going observation. This reflects a significant cultural shift from the days when judges considered it rude to enter each other's courtrooms. To facilitate this program, lawyers must also make a cultural shift: when you see a judge in the audience section of a courtroom, do not wonder whether the judge on the bench is in some sort of trouble; rather, recognize that two judicial colleagues are demonstrating their commitment to continuous improvement by engaging in peer observation.

Effective, efficient, and consistent delivery of justice also requires change.

The Superior Court has long appreciated the value of timeliness; we have had time standards for civil cases since 1988, and for criminal cases since 2004, and we have systematically monitored compliance with time standards statewide for more than ten years. Our initiative over the last decade to achieve firm trial dates produced strong results; it is now a rare event in the Superior Court that a case ready for trial is not reached.

These efforts have moved in the right direction, but are not enough; the needs of litigants today dictate a more innovative and targeted approach. In response to the initiative Chief Justice Gants announced last fall, our working group on civil litigation alternatives, which includes lawyers in various practice areas as well as judges, is working on devising a set of options to be available to lawyers and litigants to streamline the route to cost-efficient outcomes.

Efficiency and effectiveness require that we identify and adopt consistent best practices throughout the Court, so that lawyers and litigants know what to expect when they come into the Superior Court, in any county or session. Technology will assist us in this effort. By the end of September of this year, the entire Court will have completed conversion to the MassCourts case management system. MassCourts will improve processes directly, as well as facilitate data collection. Standard form notices and orders will issue automatically upon certain docket entries and the scheduling of certain events, and eventually will be transmitted to counsel electronically. Selected filings and court decisions will be scanned into the record, and will eventually be available for electronic access. The Attorney Portal will give lawyers access to docket entries, as well as to their own schedules of court events. Electronic filing will take longer to implement, but it is on the horizon.

Judicial assignments affect consistency of practices and rulings. As Chief Justice, I have the responsibility to make assignments based on the overall needs of the Court and the public, balancing the benefits and the costs of rotation. I have been conducting an on-going open discussion on this topic with judges, clerks, and lawyers over the past several months, and will continue the discussion, so as to inform the assignment process for next year and beyond.

Along with quality and efficiency, we need to improve access. The Superior Court has fewer self-represented litigants than other courts, but we have some, and the changes we make to demystify court processes will improve access for lawyers and their clients as well, without any sacrifice in quality. Changes planned or in progress include posting forms and instructions on our website; posting clear signs and schedules of events; providing information desks; and making civil dockets and appropriate case materials available to the public on-line.

We are also working to increase access to Alternative Dispute Resolution, utilizing the services of two public-spirited retired judges who have generously agreed to volunteer their time without charge: retired Judge Paul Chernoff conducts mediations in Middlesex County, and retired Judge John Cratsley provides ADR services in Suffolk County for litigants who would be unable to purchase such services in the private market. We are also working with county bar associations to strengthen long-standing conciliation programs.

To make the changes that are necessary to meet the needs of today's litigants, we need the support and participation of the bar, both in advocating for adequate funding, and in providing views and expertise. I welcome input from the bar on any of the topics mentioned here, or any other topic that might advance our efforts to provide timely justice to the public.

Judith Fabricant has been Chief Justice of the Superior Court since December 1, 2014, having served as Associate Justice of the Superior Court starting in 1996. Before her appointment to the bench, she was Chief of the Government Bureau in the Office of the Attorney General of Massachusetts; an assistant district attorney for Essex County, Massachusetts, and Wake County, North Carolina; an associate with Hill & Barlow of Boston; and a law clerk to Judge Levin H. Campbell of the United States Court of Appeals.

Massachusetts Grand Jury Primer: A Glimpse of Grand Jury Practice

by Linda M. Poulos



The Profession

The right to be indicted by a grand jury in cases of capital and serious offenses is guaranteed under the Fifth Amendment to the U.S. Constitution and Article 12 of the Massachusetts Declaration of Rights. Grand jury proceedings have been the focus of national attention this past year. Yet few people across this country understand how a grand jury functions. Further, grand juries vary from state to state in make-up, jurisdiction, and procedure. Here in Massachusetts, grand jury practice strives to maintain the integrity and character of this essential component of our criminal justice system.

The grand jury occupies a unique and historic place in our jurisprudence. See *Jones v. Robbins*, 8 Gray 329, 342-50 (1857); *Commonwealth v. Riley*, 73 Mass. App. Ct. 721, 726 (2009). Comprised of citizens who sit independently and in secret, “the grand jury have the dual function of determining whether there is probable cause to believe a crime has been committed and of protecting citizens against unfounded criminal prosecutions.” *Lataille v. District Ct. of E. Hampden*, 366 Mass. 525, 532 (1974). Probable cause is reasonable grounds to believe that a crime has been committed by a certain person. “[A]t the very least the grand jury must hear sufficient evidence to establish the identity of the accused and probable cause to arrest him.” *Commonwealth v. McCarthy*, 385 Mass. 160, 163 (1982) (citations omitted).

In Massachusetts, the grand jury is comprised of twenty-three citizens. A Superior Court judge, usually assisted by an Assistant District Attorney, empanels a grand jury every three months. In Suffolk County the jury sits four days per week for the entire three months. Though some employers pay for all jury service, most will pay only the required first three days of service after which the State will pay fifty dollars per day. Using individual *voir dire*, the judge inquires of each potential juror on the issues of hardship and impartiality. Finding fair and impartial grand jurors who can commit to this three month schedule under these financial conditions is difficult, and empanelment usually takes two days. Once twenty-three jurors are chosen, the court will administer the Grand Jury Oath, G.L. c.277, §5. The Judge follows with the

traditional instruction explaining briefly the duties and responsibilities of grand jurors, and then remands them to the care of the prosecutor to begin their work.

The District Attorney oversees the presentation of cases to the grand jury. The prosecutor's unique access to the police and the victims and witnesses of crimes provides a practical avenue to presenting cases in grand jury. The grand jury meets in secret. The witnesses and evidence that come before it are not disclosed to anyone during the pendency of any investigation. In fact, jurors are forever bound by the secrecy requirement. The grand jury serves both a screening and an investigative function. The grand jury will hear cases for which an arrest has been made to determine whether an indictment should issue, and will also conduct complex investigations into alleged crimes for which no arrest has been made. Standard cases range from simple gun and drug possessions to physical assaults and robberies, from sexual assaults and child abuse to shootings and homicides. A case cannot proceed to Superior Court for trial unless a grand jury has returned indictments.

Typically, the Assistant District Attorney will present evidence through the testimony of sworn witnesses, supplemented with physical evidence. All evidence is obtained through grand jury subpoenas. Physical evidence can take many forms: photographs, surveillance video, recorded statements, drug and gun certificates, medical and other business records. All witnesses summoned before the grand jury are entitled to be represented by an attorney. Witnesses who refuse to testify or otherwise assert a privilege will appear with counsel before a judge for a hearing on that issue. If the judge determines that the witness has a valid claim of privilege, the judge will excuse the witness from testifying. Only the grand jurors, the prosecutor, the witness, and a stenographer, lawyer or interpreter are allowed to be present during testimony. All testimony of witnesses is recorded and transcribed into grand jury minutes and these are later provided as part of a discovery package to an indicted defendant.

The evidence required for a grand jury to indict is "considerably less exacting" than the evidence required for a petit jury to find guilt at trial. *Commonwealth v. Walczak*, 463 Mass. 808, 817 (2012). See also *Riley*, 73 Mass. App. Ct. at 726. The rules of evidence are relaxed during grand jury presentations. Leading questions are allowed, and hearsay is permissible. Grand jurors have the opportunity to question witnesses. In furtherance of their duties, grand jurors may request the Court to order witnesses or potential targets to provide DNA samples, fingerprints, or even participate in lineup procedures. This evidence assists the jurors in making the ultimate finding of probable cause, and may exculpate or inculcate a potential target. Grand jury practice has developed over time to now afford the grand jurors a fuller and more complete review of the evidence. While once a single police officer may have been sufficient to establish probable cause, the current practice is for grand jurors to hear most of the percipient witnesses and to receive corroborative evidence, and such exculpatory evidence as is available.

The other major role of the Assistant District Attorney is to serve as a legal advisor to the grand jury. See *Walczak*, 463 Mass. at 823-24, 840-41. Traditionally prosecutors instruct on and explain the law

whenever appropriate, necessary, or requested by the grand jurors. *Id.* The Court, however, does not require instruction unless specifically requested by the grand jury. *Commonwealth v. Noble*, 429 Mass. 44, 48 (1999). Recently, the Court carved out an exception to this longstanding rule. In cases where the prosecutor seeks to charge a juvenile defendant with murder and where, apart from any claim of lack of criminal responsibility, there exists substantial evidence of mitigating circumstances or defenses — e.g. that the defendant acted in the heat of passion based on reasonable provocation or sudden combat — the prosecutor must instruct the jury on the elements of murder and the legal significance of this evidence on the record. *Walczak*, 463 Mass. at 809. In Suffolk County, as a case comes before the grand jury for the first time, the prosecutor will define the elements of the potential crimes and applicable legal concepts using standard jury instructions and case law. Once a jury has been instructed on a specific charge or concept, they will receive subsequent instructions as requested or needed. Before voting any charge, the grand jury has received all applicable instructions of law.

At the conclusion of the evidence, the prosecutor will ask the grand jury to vote on a charge or charges. The jurors deliberate in secret, and the prosecutor is not present. For each crime, the jurors must determine if there is probable cause to charge a certain defendant. If the Commonwealth presents sufficient evidence to meet the standard of probable cause, it is the duty of the juror to vote in favor of a true bill or indictment. In order to true bill a charge, twelve or more grand jurors must vote to support the indictment. If fewer than twelve jurors vote to support a charge, the result is a No Bill, that is, no indictment. Although twenty-three members make up a whole grand jury, a minimum of thirteen need be present to have a quorum. In all cases at least twelve jurors must vote to return a true bill or indictment. The foreperson signs the indictments on behalf of the grand jury and returns these indictments to the Court.

Ultimately, the Court oversees and reviews the grand jury process. At any time, the jurors may request instructions from a judge. For the most part, the legal requirements and responsibilities placed on prosecutors in grand jury have been simple and straightforward. In order to sustain an indictment, the evidence presented to the grand jury must establish probable cause. *McCarthy*, 385 Mass. at 163. The prosecutor also has a duty to uphold the integrity of the grand jury process and provide significant exculpatory or other mitigating evidence that would influence the grand jury's decision to indict. *Commonwealth v O'Dell*, 392 Mass. 445, 451 (1984); *Commonwealth v. Mayfield*, 398 Mass. 615, 621 (1986). Upon meeting these requirements, an indictment will survive most challenges.

The public would be impressed with the commitment demonstrated by the members of the grand jury. From the moment they take their oath to the end of the three months of service, the jurors work hard to be fair and impartial, fulfilling their solemn responsibility to properly charge individuals with crimes and to uphold their obligation to serve and protect the citizens of this Commonwealth.

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Behind the Headlines: An Insider's Guide to Title IX and the Student Discipline Process for Campus Sexual Assaults

by Djuna Perkins



Legal Analysis

Recent media coverage has caused a firestorm of controversy about how colleges investigate and discipline students for sexual misconduct. Why are these matters handled internally at all instead of being reported directly to the police? Why don't accused students receive the same due process rights they would in criminal court? And why is the "preponderance of the evidence" standard used instead of the criminal standard of proof beyond a reasonable doubt? Many argue that the process received by students accused of sexual misconduct cannot be fair without access to the due process guarantees of the criminal justice system. Done well, however, college disciplinary proceedings can result in fair and just outcomes, and provide a platform to further educate students about their rights and obligations as students and as adults.

To understand college sexual misconduct proceedings, one must understand Title IX of the Education Amendments of 1972. Title IX prohibits gender discrimination, including sexual violence, in the classroom, on the field, or in the dormitory, by any school that accepts federal funding—in other words, the vast majority of higher education institutions in the country, as well as most public, and some private, elementary and secondary schools. The Office for Civil Rights ("OCR") of the United States Department of Education enforces Title IX and periodically issues guidelines to educational institutions. Since 2001, OCR has advised schools to conduct "adequate, reliable and impartial"; "prompt and equitable"; and "effective" investigations of sexual misconduct complaints, but left it to the schools to establish systems to meet these criteria.

Prior to 2011, schools commonly used the "clear and convincing" standard of proof for sexual misconduct proceedings, or in some cases, proof beyond a reasonable doubt. Some criticized the use of these higher standards as tipping the scales in favor of those who commit sexual misconduct because they codify an incorrect, archaic, and even misogynistic presumption that all sex is consensual unless proven

otherwise. In response to such criticism, OCR issued a letter in the spring of 2011 (widely referred to as “the Dear Colleague Letter”), marking a sea change in student sexual misconduct proceedings. For the first time, OCR suggested that schools make sexual misconduct charges easier to substantiate by using the “preponderance of the evidence” standard. The “preponderance of the evidence” standard, it is said, levels the playing field and removes the presumption that all sex is consensual.

In addition to changing the recommended standard of proof, other significant aspects of the 2011 Dear Colleague letter included the requirement that anyone investigating or adjudicating college sexual misconduct matters have specific training or experience responding to reports of sexual harassment and sexual violence, and that colleges should generally complete investigations within 60 days. It also suggested that schools take interim measures to ensure the safety of the reporting student during the investigation.

In April, 2014, in conjunction with the publication of a White House Task Force report titled, “Not Alone,” OCR issued “Questions and Answers on Title IX and Sexual Violence.” The Questions and Answers *mandated* (in contrast to OCR’s earlier *suggestions*) that schools use the “preponderance of the evidence” standard, take interim measures to ensure student safety, prohibit the questioning of a complainant about sexual interactions with anyone other than the respondent, and avoid using students as adjudicators.

OCR’s Questions and Answers also required schools to permit attorneys to act as advisors, which many schools previously did not allow. However, they did not require schools to permit active participation of those attorneys in disciplinary proceedings. Most schools in fact prohibit active participation by attorneys to prevent one party from having the advantage of skilled legal counsel that the other may not have, a particular risk when the adjudicator is not a lawyer. Attorneys can still play an important role, however, by preparing clients for interviews, advising them during breaks, and ensuring they fully understand and answer the questions asked.

Additionally, the “Not Alone” report approved the increasingly popular “single investigator” model, in which a single investigator—whether an employee or outside consultant, lawyer or non-lawyer—gathers all the evidence, questions witnesses, and issues findings and conclusions. The report noted that preliminary research demonstrated that this model has “very positive results” because it “encourage[s] reporting and bolster[s] trust in the process, while at the same time safeguard[s] an alleged perpetrator’s right to notice and to be heard.” When the single investigator model is used, generally the accused receives a written notice that the college has received a report of sexual misconduct, including basic details such as the date and location of the alleged incident, and the name of the reporting party. The investigator then interviews the complainant, the respondent, and the witnesses, at mutually convenient times. The investigator asks principals and witnesses to provide names of witnesses and to produce relevant documents, and identifies additional relevant witnesses and documents. Questioning is non-adversarial, and the investigator seeks information relevant to possible defenses as well as evidence that supports the

allegations. Re-interviews give a party the opportunity to respond to new information or to clarify previous statements. The investigator ultimately writes a report summarizing factual findings and applying specific provisions of the college's sexual misconduct policy to the facts. Regardless of the model used, colleges must investigate verbal and written reports of sexual misconduct, anonymous complaints (when possible), and additional allegations discovered during the course of the investigation.

Like criminal laws, which differ among states, student discipline processes vary by college, but some notable models have emerged. Some institutions exclusively use the single-investigator model, with an administrator adopting the recommendation of the investigator. Others use a hybrid model in which a single investigator makes a recommendation to a panel of administrators (sometimes from other institutions, to ensure impartiality) who make a final decision, sometimes meeting with the investigator and the students separately. Some schools continue to hold formal hearings at which the students appear, but have instituted measures to prevent re-traumatization of the reporting student, such as placing a partition between the reporter and respondent, or having the parties in different rooms but able to participate by video feed. While the number of institutions in Massachusetts makes it difficult to say with certainty which model most schools use, the model that appears to have the most momentum is the hybrid in which the investigator gathers facts and analyzes potential policy violations, and a panel of administrators reviews the conclusions with the investigator and the students to make its final decision.

Most Massachusetts colleges prohibit a wide variety of sexual misconduct, some of which—such as sexual harassment—may not constitute a crime. Still, these prohibitions set important boundaries that will help guide students in their sexual interactions throughout their adult lives. For instance, most of these colleges use the “affirmative consent” standard, in which the initiator of a sexual act must obtain consent, whether verbal or non-verbal, for any sexual act. Under this standard, consent to one act is not necessarily consent to another, consent may be withdrawn at any time, and silence does not equal consent. Consent also plays a key role in criminal prosecutions for rape, but there are significant differences between consent in that context and in how colleges treat sexual assault.

To prove rape in Massachusetts, the Commonwealth must persuade a fact finder that the accused committed “sexual intercourse with a person...by force and against his will.” G.L. c. 265, § 22 (b). “Against his will” means the same as “without her consent.” *Commonwealth v. Roosnell*, 143 Mass. 32 (1886). Rather than requiring the initiator of the sexual act to ensure that he has consent before proceeding, criminal prosecutions require the Commonwealth to prove a *lack* of consent beyond a reasonable doubt. Since Massachusetts does not further define consent, jurors—many of whom harbour outdated beliefs about sex and gender roles—may determine for themselves whether a lack of resistance, silence, or consent to a different sexual act equals consent to the one charged. Thus, in criminal sexual assault cases, like in college discipline cases before the Dear Colleague Letter, the deck is stacked in favor of the defendant.

While they may seem counterintuitive to criminal-law practitioners, affirmative-consent policies—in which students must be certain the desire for sex is mutual—promote socially responsible and considerate sexual interactions. Most people already follow these guidelines instinctively, because such consideration is no different than the consideration we display in the countless other non-sexual social interactions we engage in every day, such as checking traffic before changing lanes, and asking permission before borrowing a friend's car. Adding sex to the equation does not reduce our social obligations. Affirmative-consent policies also promote gender equality by dismantling the presumption of criminal cases that all sex is consensual. Finally, by helping control for potential bias of fact finders, affirmative-consent policies, along with the lower standard of proof, promote greater accountability for sexual misconduct.

That college sexual misconduct policies may result in greater accountability for a broader range of offenses than does the criminal justice system does not make those policies inherently unfair. Nor does the fact that the due process protections provided at colleges differ from those available in the criminal setting. OCR recognizes that possible expulsion from school does not warrant the same due process protections provided to those facing possible imprisonment.

In addition, although much of the conduct addressed by college policies doesn't rise to the level of criminal prosecution, colleges and universities correctly address such socially inappropriate behavior through school disciplinary procedures. After all, students increasingly learn fundamental social skills in school. Learning to hold themselves to the higher standard of sexual behavior expected by college policies better prepares students for adult life. When students are permitted to present evidence in a private, non-adversarial setting in which investigators and adjudicators have the appropriate skills and expertise, listen carefully, and treat them respectfully, the result is a fair process in which students and the campus community can have confidence.

Djuna Perkins is the principal of DP Law, a law firm in Dedham, Massachusetts that provides fact-finding, training and representation in sexual misconduct matters for schools and employers.

Homeless Court: The Court of Second Chances

by Judge Kathleen Coffey



Voice of the Judiciary

The Homeless Court is a specialty court or ‘problem solving’ court established in 2010 at the West Roxbury Division of the Boston Municipal Court. It addresses the needs of individuals who are residents of the Pine Street Inn and area shelters within the City of Boston and who have open default warrants for misdemeanor and low level felonies in all courts throughout the Commonwealth. This justice initiative is based upon the premise that there is room for treatment, compassion and for recovery within the court system. It recognizes that homelessness presents a complicated challenge to the courts demanding alternative approaches in the administration of justice. The court seeks to make the justice system more accessible, accountable and responsive to the needs and challenges faced by this most vulnerable population.

The Homeless Court is modeled after a court program started in San Diego, California for homeless veterans in 1989. Homeless courts currently operate in Phoenix and Tucson, Arizona, New Orleans, Louisiana, and Houston, Texas. This initiative in Massachusetts began as a collaborative effort of attorneys from the Committee for Public Counsel Services (CPCS) and from District Attorney Daniel Conley’s office, and representatives from the Lemuel Shattuck Shelter and court leaders. In the past four years, the Homeless Court has grown to encompass the Pine Street Inn and other area shelters within the City of Boston including Woods Mullen Shelter and St. Francis House. Homeless Court is commonly called “The Court of Second Chances” because it recognizes the importance and value of a ‘second chance’ and rewards those individuals who have demonstrated a commitment to change self-destructive behaviors that led to criminal activity by participating in substance abuse and mental health treatment and maintaining recovery through job training programs and employment. Lyndia Downie, the President and executive Director of the Pine Street Inn since 2001, embraces the concept of offering a second chance to her residents but recognizes that in Homeless Court, “No one is given a free pass; rather, they are just given a chance to rebuild their lives.”

The Problem: Challenges of the Homeless within the Criminal Justice System

The homeless population presents unique needs and challenges to the criminal justice system due in large part to the financial and social instability in the individual's life and the concomitant personal issues that caused them to become homeless. It is evident that there is a far greater likelihood that a homeless individual will enter the criminal justice system than a housed individual. Experience shows that street violence and the widespread abuse of alcohol and drugs among the homeless population further increases the likelihood of an unfavorable police encounter. Mental health illnesses including depression, anxiety, and paranoia often plague men and women whose dignity, self-worth and identity have been eroded by the loss of a permanent home, employment and family support. Without proper medical treatment and social service interventions, the homeless find that the illnesses routinely spiral into criminal conduct and the consequential effects of arrest and detention instead of treatment and recovery.

Once a person is arrested and charged with a crime, the homeless individual is typically unable to navigate the court system. Confronted with the havoc and instability of living on the streets, homeless men and women are unable and often unwilling to comply with legal obligations and court orders. The homeless population lacks the standard 'roots in the community,' such as employment, residence, and family ties, that are contemplated in the bail statute and weighed by a judge or magistrate in determining bail and conditions of release. Default warrants are a chronic occurrence within the homeless population.

The immediate procedural consequence of an outstanding default warrant for a homeless person is the threat of arrest and incarceration. However, the collateral consequences of a default warrant are extensive. Default warrants interfere with a person's eligibility to receive permanent housing, employment and can effectually bar placement in residential substance abuse treatment programs.

The consequences of default warrants on the homeless are compounded by the reluctance and fear of an individual to go to court to have the warrants removed. The failure to return to court to address an outstanding warrant increases the likelihood that a defendant will be held on bail. This cycle of arrest, detention, default, re-arrest on the warrant and further periods of detention, unfortunately often perpetuates the despair of the homeless population and reinforces ingrained suspicion and distrust towards the police and the court system.

Default warrants also inadvertently result in the victimization of the homeless. In many instances, an individual who knows that there is a warrant for his or her arrest, avoids all reckoning with the police. Similarly, a homeless person who is a victim of a crime is much less likely to seek help and relief from law enforcement officials if the threat of an arrest on a default warrant is imminent.

The Solution: Homeless Court, "The Court of Second Chances"

The fundamental difference between a traditional court and the Homeless Court is that the Homeless Court works with people who have already changed the behavior that led to their involvement with the

criminal justice system. It has been described as a progressive plea bargaining system characterized by alternative sentencing

In the traditional judicial setting, the court requires the defendant to promise to change his or her behaviors while on probation. The primary incentive for a defendant's compliance with the judge's order is the threat of revocation of probation and incarceration. However, to be eligible to participate in the Homeless Court, an individual must have already completed a substance abuse program or be actively participating in mental health treatment and job training. All of these efforts and achievements occur prior to the Homeless Court hearing. In essence, the individual has already 'repaid his debt to society' and has fulfilled the conditions of probation that a judge would ordinarily impose.

During the Homeless Court session, social workers and case managers attest to the individual's accomplishments and present the specific obstacles that the participants have had to overcome. After reviewing documented letters of support and the sworn testimony of the treatment providers who have monitored the individual's achievements and progress, the Court is able to remove default warrants, remit outstanding court fees and dismiss cases. During the hearing, participants are recognized for their effort and resiliency in overcoming the stigma, isolation and diminished opportunity caused by their homeless condition and are provided a much coveted and well deserved 'second chance' to escape the boundaries of homelessness through permanent housing, employment and stability.

A critical component of the Homeless Court session is the spirit of cooperation and collaboration among the justice partners. Prior to scheduling a matter before the court, all cases are reviewed and vetted by the District Attorney and the participant's CPCS counsel. If a prosecutor objects to the dismissal or termination of a case, the defendant would not be eligible to participate in the Homeless Court session. When a default warrant has been issued for non-compliance of a judicial order of probation, the supervising probation officer is given an opportunity to express his opinion regarding the progress and suitability of the probationer and suitability for the session. Additionally, as noted, eligibility for the initiative is limited to misdemeanor offenses and non-violent low level felonies.

Under the progressive leadership of Chief Justice of the Trial Court Paula Carey, the Homeless Court's jurisdiction has been expanded. Currently, an outstanding warrant in any Municipal and District Court for a Pine Street Inn or area shelter resident may be addressed in the Homeless Court session in Boston. All Homeless Court sessions are held at the Pine Street Inn on the third Thursday of every month. Each participant's progress is reviewed in open court. The participants are encouraged to share their life stories. For many it is an opportunity for reconciliation with a court system that they feared for years and struggled to avoid. Three hundred and eighty three defendants have been referred for participation and have met with a CPCS attorney. One hundred and one homeless individuals have successfully met the requirements of treatment and recovery and have participated in the Homeless Court.

Many of the justice partners and social service providers maintain that the numbers alone do not adequately measure the effect and the impact that the Homeless Court has had on the lives and futures of the homeless within the City of Boston. CPCS Attorney William Lane, who has represented many defendants in the session, notes that,

“Homeless Court reinforces in our homeless community that they matter, that they have value and that they deserve to have their dignity recognized and honored. Homeless clients are excluded people almost everywhere they go, but in Homeless Court, they are told they deserve the dignity of stable, safe and comforting housing, and the Commonwealth and the courts are going to be merciful partners and supporters in that process.”

District Attorney Daniel Conley has been a consistent and steadfast supporter of the Homeless Court since its inception and was instrumental in its development. He maintains that,

“Too often, the criminal justice system is where people end up when other systems and the social safety net fails. Today’s criminal justice system is asked to do far more than it was designed for, but specialty courts show our ability to adapt by helping low-level offenders on the road to recovery and productivity. Homeless Court in particular has a bright future of collaborating with shelters, job training agencies, and other community organizations to reach those with a history of homelessness and enable support, treatment, and stability. The barriers we remove and the progress we help the clients make are rewards that are unlike those in any other specialty court.”

And finally, it should be noted that Homeless Court makes economic and financial sense. In these times of budgetary constraints and reduced judicial resources, the Homeless Court is an excellent example of how collaboration and cooperation among justice partners can create new approaches and dynamic solutions to the rising costs of detention and incarceration. It is a jail diversion initiative that offers a beacon of hope and an end to a cycle of despair and mistrust toward the court system while concurrently providing a second chance for a needy and deserving population to enjoy a stable and productive life.

Appointed to the bench in 1993 by Governor William Weld, Judge Kathleen Coffey has been First Justice of the West Roxbury Court for the past eighteen years. She is the Director of Specialty Courts for the Boston Municipal Court Department. In 2007, she established the Mental Health Court, and in 2010, the Homeless Court.

Race, Technology, and Policing

by Matthew R. Segal and Carol Rose



Viewpoint

Police departments in Massachusetts and around the nation face heightened scrutiny about racial bias in their stop-and-frisk and use-of-force procedures. Years of abusive practices, combined with videos of police killing unarmed Black men, have sparked protests and eroded trust between communities and the police. These protests, in turn, have inspired overdue conversations about race and policing.

Massachusetts lawyers and lawmakers must engage in this discourse. And technology, when supported by appropriate law reform, offers a way forward.

What the Law Says about Police-Civilian Encounters

In theory, the Constitution protects people from police actions undertaken for no good reason or, worse yet, for discriminatory reasons. Although a police officer may engage anyone in conversation, an officer may not “stop” someone without individualized and reasonable suspicion of the person’s involvement in a crime. *Terry v. Ohio*, 392 U.S. 1 (1968). Even then, the officer may not lay hands on the civilian—for example, by conducting a “frisk”—without reasonable suspicion that the person is armed and dangerous. *Id.*

Further, although the United States Supreme Court has authorized police actions that are merely pretextual, officers may not undertake actions based on race. *Whren v. United States*, 517 U.S. 806 (1996). For example, if a driver is speeding, an officer may stop his car even if the officer is *really* interested in looking for drugs. But a speeding car cannot justify a traffic stop if the officer is *really* conducting it because the driver is Black.

Former Attorney General Eric Holder reiterated these principles in December 2014 when he issued new guidance on racial profiling. Under this guidance, when federal officers conduct traffic stops and other

civilian encounters, they “may not use race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity to any degree,” except as part of a “specific suspect description.”

What We Know about Massachusetts Policing

Those lofty principles have not adequately protected people, particularly people of color, from illegitimate police actions. An independent report on Boston Police Department (BPD) police-civilian street encounters, conducted at the request of the BPD and the ACLU of Massachusetts, documents what people in communities of color have long observed: “racial discrimination in BPD [police-civilian encounter] practices.”

The report—the *only* public report on BPD street encounters—finds that BPD officers targeted people of color at far greater rates than white people. For example, reviewing 204,000 police-civilian encounters documented in “Field Interrogation and Observation” forms filled out by Boston police officers between 2007 and 2010, researchers found that Blacks were targeted 63% of the time even though they comprise just 24% of Boston’s population.

But there’s more. Even after controlling for local crime rates, Boston officers were more likely to initiate encounters in Black and Latino neighborhoods. For every 1% increase in Black residents relative to white residents, police conducted 2.2% more encounters—even when crime and gang activity stayed the same. And a 1% increase in Latino residents relative to white residents was associated with a whopping 4.1% increase in police encounters. Similarly, even after controlling for individual arrest records and gang membership, Boston officers were more likely to initiate and escalate—via a frisk or search—encounters with Black and Latino people. Yet for 75% of these encounters the police gave no real justification; they instead just wrote that their purpose was to “investigate [a] person.”

Of course, it’s not just Boston, and it’s not just street stops. A 2004 Northeastern University study, commissioned by the Massachusetts legislature, found that 249 out of 366 Massachusetts law enforcement agencies show substantial racial disparity in traffic stops. Everywhere you look, race matters.

Despite this evidence, and despite testimonials from people of color, many law enforcement and elected leaders in Massachusetts have responded by denying that race is a driving factor in police-civilian encounters—or by dismissing the data as “old.”

Those responses are not surprising. People often construe new information to reinforce their preexisting beliefs or justify their past actions. Such denials, however, reinforce the mistrust between the police and the communities that experience increased police scrutiny. How can those communities expect police departments to fix a problem whose existence they won’t even acknowledge?

What Comes Next

In May 2015, a presidential task force recommended that police departments use open data to increase transparency and build community trust, including adopting early warning systems to identify problems, increase internal accountability, and decrease inappropriate uses of force. Law enforcement leaders, likewise, have called for greater transparency. “We simply must find ways to see each other more clearly,” said FBI Director James B. Comey. “And part of that has to involve collecting and sharing better information about encounters between police and citizens, especially violent encounters.”

Specifically, Mr. Comey proposes requiring police departments to gather more and better data regarding “those we arrest, those we confront for breaking the law and jeopardizing public safety, and those who confront us.”

Bills pending before the Massachusetts legislature would do just that. One bill, *An Act regarding judicial investigations of law enforcement officer-involved deaths* (H.1428), would mandate independent investigations of deaths at the hands of police officers, and direct the Secretary of Public Safety to promulgate regulations for data collection about use-of-force incidents more generally. Three other bills would require police to collect, analyze, and make public data on race, ethnicity, and gender in traffic and pedestrian stops and arrests, as an antidote to racial profiling and disparities in law enforcement. Collecting and analyzing data—as a routine, consistent, accepted professional practice—can identify “problem areas” and serve as a foundation for fair policing practices. The premise behind all of these bills is that police departments cannot manage what they do not measure.

In addition to officers’ collection of data, civilians’ recording of incidents with cell-phone cameras also provides a measure of civil-rights protection during police encounters. But civilian recording is haphazard, at best, and sometimes dangerous for the civilian. A complementary system of police-worn body cameras, with appropriate privacy protections, would protect both law enforcement and the public. Although some opponents of body cameras have suggested that the Massachusetts law requires two-party consent, it does not. As long as a body camera is worn openly, it does not offend the state wiretap law. See Mass. G. L. c. 272, § 99.

In addition to data collection and body cameras, police departments should be required to implement implicit bias training for all officers. As FBI Director Comey pointed out: “Much research points to the widespread existence of unconscious bias. Many people in our white-majority culture have unconscious racial biases and react differently to a white face than a black face. In fact, we all, white and black, carry various biases around with us.”

Bias training for police officers, when combined with data collection, monitoring, and systems of accountability, is considered by many to be a prerequisite for lasting structural change needed to achieve a socially just society.

Finally, the new BPD report indicates that *Terry* and *Whren* have not offered complete protection from groundless or discriminatory police action. Massachusetts courts and policy makers should consider strengthening this protection through doctrines that account for new technology and deeper understandings about the role of race in policing. For example, Massachusetts courts have held that a defendant is entitled to an instruction telling the jury that it should be skeptical of a defendant's alleged confession when the police fail to record a custodial interrogation. *Commonwealth v. DiGiambattista*, 442 Mass. 423 (2004). A similar jury instruction or evidentiary rule may be warranted when an officer has the capability to record, but nevertheless does not record, a *Terry* stop. Just recently, terrorism suspect Usaamah Rahim was reportedly under constant law enforcement surveillance, yet the only video of the *Terry* stop resulting in Rahim's death comes courtesy of a grainy security camera owned by Burger King.

Similarly, in seeking to suppress evidence from a *Terry* stop, a Massachusetts defendant can rely on statistical evidence demonstrating disparate treatment of persons based on their race. *Commonwealth v. Lora*, 451 Mass. 425 (2008). Given that the only statistical study of BPD street encounters has revealed what independent researchers called "racially disparate treatment of minority persons," lawyers and courts should consider whether evidence arising from these encounters should be admitted in court.

Technology can enhance liberty, and so can modern understandings of the role of race in policing. But only if the law keeps pace.

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Procurement Opportunities in the Gaming Sector: A Good Bet for Those Who Play By the Rules

by Andrew F. Upton and Jonathan M. Silverstein



Practice Tips

Introduction

Establishment of casino gaming in Massachusetts was the subject of a passionate debate. But the Legislature has acted and casinos are in Massachusetts to stay. The Massachusetts Gaming Commission has issued three licenses—full casino licenses to Wynn Resorts in Everett and MGM in Springfield, and a “slots-only” license to Penn National Gaming in Plainville—and is considering applications for the fourth license in the southeastern region of the state.

In addition, the Commission has promulgated regulations covering the gaming industry in Massachusetts. The opportunities for vendors to provide goods and services under these regulations are extensive and will remain so for years to come.

The licensed casinos are expected to purchase an enormous variety of locally-supplied goods and services totaling between \$150 and \$200 million annually, from tomatoes to toilet paper, and from limousines to linen supply.

Although the opportunities for Massachusetts vendors to supply goods and services to casinos is substantial, so too is the regulatory burden imposed on such vendors. This article will provide an overview of the process and the issues to which attorneys should pay particular attention.

Statutory Overview

In November 2011, Governor Patrick signed into law the Expanded Gaming Act (“Act”), which included a new Chapter 23K of the General Laws. Among the stated goals of the Act are providing “new

employment opportunities” and “promoting local small businesses and the tourism industry.” G.L. c.23K, §1(5)-(6).

However, the Act also emphasizes integrity in the licensing process. This emphasis extends from vendors to casinos. Under the Act, “[n]o person shall conduct business with a gaming licensee unless such person has been licensed or registered with the commission.” G.L. c.23K, §31(a). The Act creates two broad classes of vendors – gaming vendors and non-gaming vendors. Gaming vendors, those who make and service gaming and simulcasting equipment, must be licensed by the Commission, whereas non-gaming vendors are subject only to registration with the Commission. Because manufacturers and servicers of gaming equipment are well-established in the marketplace, this overview will focus on non-gaming vendors – a key area of opportunity for Massachusetts businesses.

Vendors

A “non-gaming vendor” provides goods or services “not directly related to games” such as food purveyors or suppliers of the many non-gaming items that a large, destination resort needs to operate. Non-gaming vendors are required to register with the Commission.

A “secondary gaming vendor” also provides goods and services unrelated to gaming, but in amounts exceeding \$250,000 in a twelve month period or \$100,000 in a three-month period. Secondary Gaming Vendors must be licensed by the Commission. If the Commission determines that a non-gaming vendor “has met or is reasonably likely to meet the thresholds” for sales volume, it will notify the non-gaming vendor of the need to apply for licensure as a secondary gaming vendor.

The secondary gaming vendor designation only applies to non-gaming vendors, who “regularly” conduct business triggering these monetary thresholds. Single or infrequent transactions will not necessarily result in this designation. For example, a vendor who makes a single sale of \$500,000 of lighting fixtures is unlikely to be designated.

Importantly, the monetary thresholds apply to the amount of business a vendor conducts with a single gaming licensee, and not to the aggregate of all business the vendor conducts with all Massachusetts casinos. Thus, a vendor who regularly conducts business with two casinos will not be designated as a secondary gaming vendor, even if the aggregate of the business conducted with the two gaming licensees exceeds \$250,000 per year, or \$100,000 in a three-month period.

Registration/Licensing

The Gaming Commission’s Investigations and Enforcement Bureau (“IEB”) oversees the registration and licensing of vendors. The Commission’s regulations identify a number of classes of business that do not have to register — including insurance and media companies, professional services (legal, accounting, and financial services), medical services, and entertainers.

If none of these exemptions apply, the vendor must register, regardless of the monetary value of the transaction(s) conducted. The Non-gaming Vendor Registration Form requires disclosure of general business information (trade name, address and contact information, nature of services or goods provided, FEIN), as well as personal identifying information (name, residential address, social security number, and birth date) of: (a) the sales representative(s) soliciting business from the gaming licensee; (b) any person authorized to sign any agreement with the casino; and (c) any person or entity owning more than five percent of the vendor. In addition, the vendor must agree to be fingerprinted by IEB, and a registrant may have to submit a Subcontractor Information Form, which requires certain disclosures about “known or anticipated” subcontractors.

Once a non-gaming vendor has registered with the Commission, it may conduct business with a casino. IEB monitors and tracks all payments made by casinos to vendors. If IEB determines that a non-gaming vendor should be designated as a secondary gaming vendor, it will notify the vendor, who must take one of three actions within 45 days: (a) file a secondary gaming vendor application; (b) discontinue providing goods or services to the casino; or (c) file a written request for reconsideration on the ground that the goods or services are not provided on a regular or continuing basis.

Continuing Obligations

Vendors have an ongoing obligation to comply with the regulations and to notify IEB of certain changes in their status. Vendors have a duty to cooperate in any Gaming Commission inquiry or investigation. Failure to comply with Commission regulations or the Act, or the arrest or conviction of a vendor’s principal, could result in the suspension, modification or revocation of a license. Since the Commission is charged with an ongoing monitoring role, licensed vendors are advised to self-regulate as closely as possible to prevent threats to their licensure. Given the intense media scrutiny the industry and regulators face, vendors are well advised to adopt strong internal controls and compliance policies when doing business with casinos. Equally important, vendors should be forthright and transparent in their dealings with IEB. A minor incident in a vendor’s past may not preclude licensure, but lying about it may. This is one circumstance in which it is not better to ask for forgiveness than permission.

The Commission continues to supplement and revise its regulations. Unlike many longer-standing regulatory processes, the regulatory scheme for gaming and gaming vendors is relatively new. Commission staff, who are veterans of both Massachusetts state agencies and the national gaming industry, have shown a refreshing willingness to engage attorneys and applicants with pre-filing reviews and discussions offering procedural guidance, and it is worth the practitioner’s time to take advantage of this resource.

Conclusion

The establishment of four casinos in Massachusetts offers considerable opportunity for many types of vendors to access a potentially lucrative market. But this market is regulated more stringently than

most. There are significant and continuing regulatory obligations for those who participate, and public scrutiny in this highly regulated industry is certain to be constant. Detailed record keeping and communication with Commission regulators is essential and may add overhead costs for some businesses. But those who qualify and are able supply casinos in a consistently compliant manner should find themselves with a winning hand.

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The New “Documents Only” Subpoena Under Recently Amended Mass. R. Civ. P. 45

by Carlos A. Maycotte



Heads Up

Earlier this year, the Supreme Judicial Court amended **Rule 45** of the Massachusetts Rules of Civil Procedure, which concerns subpoenas. The main purpose of the amendments is to give Massachusetts practitioners the ability to issue “documents only” subpoenas to non-parties. Now, attorneys need no longer notice depositions of non-parties when the only goal is to obtain production of documents. The amendments were effective as of April 1, 2015. Before that date, attorneys in Massachusetts followed a convoluted procedure: a notice of deposition and a subpoena *duces tecum* were served on a non-party, commanding that non-party to appear at a Keeper of the Records deposition with the specified documents. The non-party would instead send the documents outlined in the subpoena *duces tecum* (with a sworn certification) to the issuing attorney, who would then waive the non-party’s appearance at the deposition. The issuing attorney would then have the documents and the non-party would never appear at a deposition.

To streamline the process, the Supreme Judicial Court amended **Mass. R. Civ. P. 45** to track the language of and the procedure described in the Federal Rules of Civil Procedure. The amendment eliminates the superfluous steps described in the previous paragraph by creating a new class of subpoenas. Now, the attorney may serve a “documents only” subpoena, and the person receiving it “need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.” The subpoenaed party can simply send the documents to the issuing attorney.

Where the previous incarnation of **Mass. R. Civ. P. 45(a)** provided generally that a subpoena shall “command each person to whom it is directed to attend and give testimony at a time and place therein

specified,” the amended rule provides greater detail, stating that a subpoena shall “command each person to whom it is directed to do the following at a specified time and place: to attend and give testimony; to produce designated documents, electronically stored information, or tangible things in that person’s possession, custody, or control; or to permit inspection of premises.” By listing the several purposes for which a subpoena may be issued, the amendment has created new categories of subpoenas that can be targeted for a more economical civil practice.

The new procedure for issuing “documents only” subpoenas in the amended **Mass. R. Civ. P. 45(b)** further provides that commands to produce documents or electronically stored information may be set out in subpoenas separate from those that command attendance, and that the subpoena “may specify the form or forms in which electronically stored information is produced.” Practitioners will be able to use this provision to require that the document production be made in a specified format, so that they are able to compile and review documents more effectively.

The amended rule also provides certain protections for non-parties. The reporter’s notes recognize that the person receiving a subpoena may have “no stake in the case” and may not have the assistance of counsel. Thus, a party issuing a subpoena “must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.” A non-party on whom a subpoena is issued has 10 days from the date of service to object to the subpoena and must serve the objection on all parties. After an objection has been made, the burden shifts to the issuing party, who must then justify the need for the documents via a motion to compel. In practice, Massachusetts courts have generally been protective of non-parties in the discovery context, and these protections will likely be reinforced by the amended rule.

At the same time, the amended **Mass R. Civ. P. 45(c)** specifies that the requirement to tender fees to a person served with a subpoena does not apply to cases where the person is not commanded to appear – meaning that while a non-party may have an easier time complying with a subpoena, he or she may not receive a fee, however nominal, for doing so.

Although the amendments to **Mass R. Civ. P. 45** align the Massachusetts rule more closely to the federal rule, important differences remain. Mass R. Civ. P. 45(d)(1) provides that prior to the service of a “documents only” subpoena on a third person, a copy of the subpoena must be served on all parties to the case. This differs from the **federal rule**, which requires that both notice *and* a copy of the subpoena be served on all parties to the case. The Massachusetts rule eliminates an unnecessary step, allowing a copy of the subpoena to operate as adequate notice that a subpoena has been served. Unlike the federal rule, this provision in the Massachusetts rule also tasks the issuing party with serving copies of any objection to the subpoena on all parties. In addition, the issuing party must serve all other parties with either notice that a production was made or an actual copy of the documents produced.

These amendments should help make civil procedure more efficient. By eliminating the need to notice a deposition *and* issue a subpoena to non-parties from whom only documents are needed, less paperwork will be required from issuing parties. The streamlined procedure will save practitioners time, and clients, money. The amendment to **Mass R. Civ. P. 45** should be well received by Massachusetts attorneys.

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