



MACDL

Massachusetts Association of
Criminal Defense Lawyers

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December 14, 2021

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"I doubt that anyone believes that we should go back to exactly the way things were before the pandemic, and we expect to continue many of the advances it brought about ... We have learned, for example, that not all court events need to take place at the courthouse. We can save litigants and their lawyers considerable time and expense by holding some hearings virtually when appropriate."

- Supreme Judicial Court Chief Justice Kimberly S. Budd, State of the Judiciary address, October 27, 2021

Dear Chief Justices of the Massachusetts Courts,

In keeping with Justice Budd's comments, we write on behalf of the Massachusetts Association of Criminal Defense Lawyers in support of the continuation of improvements implemented in response to the COVID-19 pandemic. For the reasons outlined below, we propose the Trial Court consider the following best practice recommendations.

Best Practice Recommendations

- I. Where no substantive harm exists for the defendant, and *with the defendant's free and voluntary consent, unfettered by coercion express or implied*, virtual conferencing (video or telephonic) shall be permitted for pretrial proceedings.

- II. Courts should schedule cases for specific times, or groups of cases for a specific time range, giving due regard to the preferences of counsel and their clients and the volume and needs of a particular session, and avoid the inefficient practice of implementing a general call of scheduled cases.
- III. On or before the date of any scheduled conference, counsel for the parties shall participate in a conference via Zoom or similar platform, or via email, unless the parties jointly certify that the matter has previously been conferenced and no further conference is required.
- IV. Courts should implement a system which permits counsel to identify their cases as ready during a call of the list. Cases identified as ready should be given precedence over all other matters.
- V. The preferred method of communication between courts, the Commonwealth, and attorneys should be email. The Trial Court should prioritize making the business email address of each attorney publicly available and collaborate with the Massachusetts Board of Bar Overseers to facilitate this objective. All assistant district attorneys and assistant attorneys general shall make their business email addresses publicly available on their respective office's website.
- VI. The Court should prioritize the implementation of an electronic filing system for all criminal filings. Record requests should be accepted electronically and courts should provide the requested documents electronically unless the volume makes it impracticable. Courts should permit electronic signatures for remote signing. Parties to criminal cases should exchange documents and discovery electronically.
- VII. Courts should resolve administratively all matters that can be resolved without the necessity of a formal court appearance unless a hearing is warranted in the interests of justice or unless a justice of the trial court determines in his or her discretion that an in-court appearance will promote the efficient resolution of the court's business. There shall be a presumption that routine proceedings such as scheduling, continuance requests and other uncontested motions such as motions for funds¹ or criminal records will be resolved administratively.

¹ The Trial Court should ensure that provision is made for resolution of ex parte motions where appropriate. See Reporter's Notes to Mass. R. Crim. P. Rule 13; Commonwealth v. Dotson, 402 Mass. 185 , 187 (1988); Commonwealth v. Haggerty, 400 Mass. 437 , 441 (1987)

VIII. Courts equipped with "Whispertech" or similar technology, which permits attorneys to participate in sidebar conferences from counsel table, should continue to make that technology available to litigants. Such technology streamlines trials and renders sidebars less disruptive.

Background

Not every court appearance on a criminal case needs to be in person. Indeed, after arraignment and before evidentiary hearings, there are events — discovery motions, pre-trial hearings, compliance and status dates — which, *with the voluntary consent of the defendant, unfettered by coercion express or implied*, can be effectively accomplished by videoconference or even a telephone conference. Eliminating in-person appearances for non-controversial events eliminates inefficiencies, saves valuable time, and sacrifices nothing of substance. Such improvements ought to remain in effect and be expanded upon in all instances where consistent with the defendant's right to a fair trial and where the individual defendant voluntarily consents.

Remote hearings avoid unnecessary travel to the physical courthouse, sometimes over great distances, to appear for routine matters. Attorneys and parties aren't forced to sit in a holding pattern, sometimes for hours, to address the court for hearings that last a few minutes or less. Lawyers aren't required to remain idle and unable to attend to other matters, and parties - the majority of whom are indigent - aren't forced to miss work, school, and care taking of loved ones. Conversely, by allowing for remote access to court, the public's access to justice increases.

The use of virtual appearances is not novel to the courts. For instance, bail reviews have been conducted remotely and without the consent of the defendant. This is so despite the consensus among defense attorneys that remote bail hearings detract from their overall fairness. It seems unjust, therefore, that critical proceedings may be conducted remotely and over the defendant's objection, but routine matters may not — despite potential jeopardy to a client's job, school and/or family.

In fact, prior to and throughout the early part of the pandemic, incarcerated defendants were not transported to a wide range of court events, thus excluding them from the court process entirely. The introduction of technology arising from the Court's Covid-19 response ameliorates this harm by providing a virtual platform to facilitate their attendance. As to this category of court proceedings, remote hearings would not only conserve vital resources, but would dramatically increase the fairness of criminal proceedings.

Another improvement is the use of scheduled hearing times. In this regard, up until the pandemic, Massachusetts state courts have remained decidedly behind the times. For instance, in federal court and in neighboring New Hampshire state court, cases are scheduled to be heard at a designated time. In Massachusetts, the vast majority of courts require attorneys and their clients to appear at 9:00am, then wait for an indeterminate amount of time until their case is called, sometimes as late as 4:30pm. Not only are the parties inconvenienced, but this occurs at great

expense to the defendants and the Commonwealth, while the courts repeatedly call case that aren't ready to be heard.

The use of email to conduct court business marked another vital improvement — including for scheduling, submission of documents, and resolution of routine matters, such as continuance requests. In Massachusetts civil proceedings, federal court, and New Hampshire state court, virtually all documents and pleadings are filed electronically. In response to Covid-19, filing was accomplished quickly, efficiently, and reliably via email.

Lastly, we respectfully recommend that the Trial Court promulgate uniform standards and rules applicable to each courthouse. Across the Commonwealth there are hundreds of courthouses, each with their own customs and practices — few of which are reduced to writing or made publicly available. Inconsistent and confusing practices and customs do little to further the efficient administration of justice and equal access to the courts.

Thank you for your attention to our concerns and recommendations. We welcome the opportunity to speak further about the issues raised in our letter, and thank you for your commitment to the equitable and fair administration of justice.

Sincerely,

A handwritten signature in cursive script that reads "John Amabile".

John Amabile
MACDL President