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TRANSMITTAL NO. 998

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MEMORANDUM

TO: District Court Judges, Clerk-Magistrates and Chief Probation Officers
FROM: Hon. Lynda M. Connolly, Chief Justice
DATE: September 10, 2008
SUBJECT: **Revised Standards on the Complaint Procedure**

I am very pleased to distribute to you the attached copy of the revised District Court Standards of Judicial Practice, *The Complaint Procedure*, to be effective October 1, 2008.

The original Complaint Standards were developed in 1975 and have served us well in this important (and long largely-undocumented) area of criminal practice. Since 1975, as the appellate courts have increasingly examined the complaint issuance process, they have been informed by and often cited the Complaint Standards in their decisions. In recent times accumulating appellate decisions and statutory and rules amendments have brought about many changes in law and practice and necessitated a complete revision of the Complaint Standards.

I commend the revised standards to the careful review of all our clerk-magistrates, assistant clerks and clerk's office personnel. It will also be very helpful for judges to be familiar with them, since judges have an important role in rehearings and in subsequent challenges to a magistrate's probable cause finding.

I am grateful to the Committee on Criminal Proceedings for undertaking this revision, and to the Advisory Committee of Clerk-Magistrates for their suggestions on an early draft. Thanks are also due to the many other clerk-magistrates and assistant clerks who offered comments on the revised standards in draft form.

In FY 2008, more than 85,000 show cause hearings were conducted by District Court magistrates and more than 233,000 criminal complaints issued. It is my hope that the revised Complaint Standards will be even more helpful to magistrates and judges in this significant area of District Court jurisdiction.

The revised standards are available in the Criminal area of the District Court intranet site at <http://trialcourtweb.jud.state.ma.us/courtsandjudges/courts/districtcourt/criminal.html> and our internet site at <http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/criminal.html>. The search feature of your PDF reader software will make it simple to search the standards for any word or phrase by simply clicking on the "binoculars" icon on the tool bar. Alternately, you may select Edit and then Search from the menu bar, or type Shift+Ctrl+F.

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT OF THE TRIAL COURT



STANDARDS OF JUDICIAL PRACTICE

THE COMPLAINT PROCEDURE

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Ellen S. Shapiro, Deputy General Counsel

October 1, 2008

ADMINISTRATIVE OFFICE OF THE DISTRICT COURT

DISTRICT COURT ADMINISTRATIVE REGULATION

No. 5-75

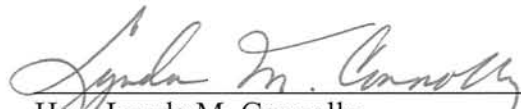
(Amended October 1, 2008)

**PROMULGATION OF STANDARDS OF JUDICIAL PRACTICE,
*THE COMPLAINT PROCEDURE***

(Revised October 1, 2008)

Administrative Regulation 5-75 is hereby amended as follows, effective October 1, 2008:

The provisions of the Standards of Judicial Practice, *The Complaint Procedure*, as revised, are hereby promulgated for use in the District Court Department.



Hon. Lynda M. Connolly
Chief Justice of the District Court

Effective: October 1, 2008

Note:

Standards on *The Complaint Procedure* were first promulgated by my predecessor Chief Justice Franklin N. Flaschner in 1975. They were developed by the District Court Committee on Standards, consisting of Hon. Morris N. Gould (Worcester), Chair, Hon. Monte G. Basbas (Newton), Hon. Kevin R. Doyle (Waltham), Clerk-Magistrate John E. Flaherty (South Boston), Clerk-Magistrate George H. W. Hayes II (Ipswich), Hon. George C. Keady, Jr. (Springfield), Hon. Daniel H. Rider (Dedham), Assistant Chief Probation Officer David F. Scott (Quincy), and Chief Probation Officer Joseph M. Souza (New Bedford).

In the years following their development, the Complaint Standards made a significant

contribution in shaping practice and procedure in this unique area of District Court jurisdiction. At that time, there was little decisional law to offer guidance, and the Standards had significant influence in standardizing practices throughout the District Court. They have often guided and been cited in appellate decisions.

During those same years the mechanics of complaint preparation in the pre-computer era were greatly simplified by the introduction of a standard Application for Complaint form and a multi-part Complaint form on which the charging language for multiple counts could be entered using a disk-driven memory typewriter. This permitted the introduction of a single multi-count complaint for each case rather than separate, pre-printed complaint forms for each count. In 1982 this system and its designer, Deputy Court Administrator Dennis J. Casey, were recognized with the National Center for State Courts' Paul C. Reardon Award. Simultaneously, standardized charging language was introduced throughout the District Court. Today the Administrative Office of the District Court provides courts with uniform charging language for more than 5,000 offenses through the Trial Court's MassCourts computer system.

In recent years a number of significant appellate decisions and statutory and rules amendments have made a comprehensive revision of the Complaint Standards necessary. I am grateful to the Committee on Criminal Proceedings for undertaking this complex task. Thanks also to the Advisory Committee of Clerk-Magistrates for their review and suggestions, and to the many other clerks who commented on the revised standards in draft form. Special thanks are due former committee member Hon. Stephen S. Ostrach (Region 4), who initially outlined the legal changes in this area of law, and particularly to committee member Assistant Clerk-Magistrate James J. Foley (Quincy), who took the lead role in researching and drafting the necessary changes to the standards.

Unlike rules of court, the Standards of Judicial Practice are not mandatory in application. They represent a qualitative judgment as to best practices in each of the various aspects of the Complaint procedure. As such, each court should strive for compliance with the Standards and should treat them as a statement of desirable practice to be departed from only with good cause. In addition, many references are made throughout the Standards to provisions of statutory and case law which, of course, must be observed.

These Standards may be amended from time to time. Comments and suggestions on how they may be improved are always welcome and should be sent to the Administrative Office of the District Court, Two Center Plaza, Boston MA 02108.

THE COMPLAINT PROCEDURE
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GENERAL
(Standards 1:00 and 1:01)

1:00 General

These Standards describe the legal requirements and recommended practices for responding to applications from law enforcement officers and private persons seeking to initiate criminal proceedings in the District Court.

Commentary

The complaint procedure is a judicial process in which clerks and judges of the District Court serve a grand jury-type function to determine whether a person is to be charged as a defendant in a criminal case.

The Standards are not intended to modify the authority of magistrates as established in the General Laws, most particularly in G.L. c. 218, §§ 32-35A and G.L. c. 276, § 20B and §§ 22-25.

This is a revision of the Standards originally promulgated in 1975. They have been updated to reflect amendments to the General Laws and the Massachusetts Rules of Criminal Procedure, as well as to encompass recent decisions of the Supreme Judicial Court and the Appeals Court and to reflect various transmittals from the Administrative Office of the District Court discussing aspects of the complaint process.

1:01 Definitions

APPLICATION FOR COMPLAINT: The document used to apply for, and to capture basic information about, a proposed criminal charge.

CLERK: A clerk-magistrate, temporary clerk-magistrate, assistant clerk or temporary assistant clerk.

COMPLAINANT: The person who signs the complaint under oath.

COMPLAINT: The formal written charge of crime to which the accused must answer.

COURT: A division of the District Court Department. In these Standards the term “court” is used to refer to the court as an administrative unit.

FELONY: A felony is a crime which may be punished with a state prison sentence. G.L. c. 274, § 1.

MAGISTRATE: In these Standards, the word “magistrate” means a District Court official authorized by law to authorize criminal complaints and issue process, including a clerk-magistrate, temporary clerk-magistrate, assistant clerk or temporary assistant clerk, whether or not designated as a magistrate pursuant to G.L. c. 221, § 62B. See G.L. c. 218, §§ 32, 33 and 35. Unless the context indicates otherwise, the word “magistrate” also includes a judge who is considering an application for criminal complaint.

The word “magistrate” in these Standards does not include an employee who has been designated by the clerk-magistrate as a deputy assistant clerk under G.L. c. 218, § 10A. Deputy assistant clerks may not conduct show cause hearings, find probable cause, authorize a complaint or issue process, but may administer the oath and witness the complainant’s signature to the complaint.

MISDEMEANOR: A misdemeanor is a crime which may not be punished with a state prison sentence. G.L. c. 274, § 1.

PRIVATE COMPLAINANT: A private complainant is one who is not an assistant attorney general or assistant district attorney, police officer, or other law enforcement officer or official.

PROBABLE CAUSE: Reasonably trustworthy information sufficient to warrant a prudent person in believing that a crime has been committed and that the accused is the perpetrator.

PROCESS: An arrest warrant or summons. If a magistrate grants an application for a complaint and the accused has not been arrested, the magistrate will order the issuance of either a summons or an arrest warrant.

Commentary

The “complainant” is the person who signs a criminal complaint under oath. “In general, anyone may make a criminal complaint in a District Court who is competent to make oath to it.” *Commonwealth v. Haddad*, 364 Mass. 795, 798, 308 N.E.2d 899 (1974). For that reason, the complainant must be a natural party, even if acting on behalf of an agency, organization or business entity. A complainant need not have been an eyewitness to the crime or have first-hand knowledge of it. Mass. R. Crim. P. 3(g)(1) and 4(b); *Commonwealth v. Dillane*, 77 Mass. (11 Gray) 67 (1858); *Commonwealth v. Cote*, 15 Mass. App. Ct. 229, 236-237, 444 N.E.2d 1282, 1288 (1983). A complaint, like a grand jury indictment, may be based entirely on hearsay. Mass. R. Crim. P. 4(c); *Commonwealth v. Kater*, 432 Mass. 404, 412, 734 N.E.2d 1164 (2000). This applies to police complainants as well as private complainants.

In many courts a single police prosecutor presents applications for complaint for all offenses prosecuted by that police department. In such cases, the designated officer has only information from other officers and no first-hand knowledge. This is a sound and appropriate administrative practice which should be encouraged. Massachusetts R. Crim. P. 4(b):

“authorizes the signing of the complaint by persons other than the arresting officer in order to avoid requiring the officer’s presence at any time prior to the probable cause hearing or trial. [Rule 4(b)] is grounded in the desire to avoid removing an officer from his regular work shift to execute the mere formality of personally signing the complaint.” Reporter’s Notes to Mass. R. Crim. P. 4 (1979).

Note on terminology. In older statutes the term *complaint* often refers to what we would today call an *application for complaint*. Under that traditional nomenclature, *complaints* were “received” by a court, and *process* (a summons or a warrant) then “issued” on a complaint where appropriate. See, e.g., G.L. c. 218, §§ 35-37; c. 276, §§ 21-22; Mass. R. Crim. P. 4(b). However, usage was never entirely consistent. “The word ‘complaint,’ as used in the statutes of this Commonwealth in reference to criminal offences, sometimes means the formal written charge of crime to which the accused person is to answer, and sometimes it means the oral charge which may be made to a proper magistrate or court, and which is to be reduced to writing by the magistrate or court.” *Hobbs v. Hill*, 157 Mass. 556, 557, 32 N.E. 862, 862 (1893).

These Standards follow the modern tendency (reflected in some more recent statutes) to speak of an application for complaint being “received” or “filed,” after which a judicial officer may “authorize” or “issue” a complaint and, if needed, also issue process on the complaint. See, e.g., G.L. c. 218, § 35; Mass. R. Crim. P. 3(g); *McAvoy v. Shufrin*, 401 Mass. 593, 598 n.5, 518 N.E.2d 513, 517 n.5 (1988).

WHEN THE ACCUSED HAS BEEN ARRESTED
(Standards 2:00 through 2:06)

2:00 Initiating the complaint procedure for persons arrested without a warrant

Where an arrest without a warrant has been made, the police complainant must file an application for complaint with the clerk's office and attach a police report or other statement of facts which provides the basis for the charge(s).

The statement of facts must include all of the facts necessary to support a finding of probable cause for each element of the offense(s) being sought and identify the accused as the perpetrator.

The application should include sufficient personal identifying information so that the accused may be accurately identified in the MassCourts computer system and any warrant or other process subsequently issued in the case. It should also include all the information about the offense that is necessary to complete the complaint form, such as the date of offense, the victim's name, a description of any property stolen or damaged, or the type of weapon or controlled substance.

For a motor vehicle violation, the application for complaint must be accompanied by the court copies of the motor vehicle citation.

Commentary

Police must bring an arrested person who has not been released on bail "forthwith" before the court "if then in session, and if not, at its next session." G.L. c. 276, § 58; Mass. R. Crim. P. 7(a)(1).

An application for complaint should be completed on the standard "Application for Complaint" (DC-CR-2) form. Court personnel must insure that the complainant has supplied adequate and complete identifying information about the accused (i.e., full name, date of birth, address, etc.) unless a waiver is given for good reason. See also G.L. c. 276, § 23A (unless waived by clerk-magistrate, any individual or law enforcement agency requesting court to issue warrant must provide person's name, last known address, date of birth, gender, race, height, weight, hair and eye color, any known aliases, and other information required for warrant to be accepted by the Commonwealth's computerized Criminal Justice Information System). Such information is equally important in correctly identifying the accused when a complaint is initially authorized and is therefore required in the application for complaint.

Massachusetts R. Crim. P. 3(g) requires that the complainant "convey to the court the facts constituting the basis for the complaint and which "establish[] probable cause to believe that the person against whom the complaint is sought committed an offense." Rule 3(g) requires that these facts "shall be either reduced to writing or recorded."

District/Mun. Cts. R. Crim. P. 2(a) and 3(a) require that in arrest cases the police submit with the application “a written statement describing the facts constituting the basis for the arrest” to be given to the defendant at arraignment.

In a motor vehicle case, the police must accompany the application for complaint with the court copies of the motor vehicle citation. G.L. c. 90C, § 4. While § 4 would permit “one copy of the [citation to] serve as the application for complaint,” the standard application form is also required, since the citation alone does not include all the personal identifying information that is required by G.L. c. 276, § 23A or the written statement of facts establishing probable cause that is required by Mass. R. Crim. P. 3(g) and Dist./Mun. Cts. R. Crim. P. 2(a).

While the name of an alleged victim is generally not an essential element of a complaint, the name of the victim (and sometimes witnesses) is usually included in an application for complaint. (An exception is sometimes encountered for sexual offenses, where G.L. c. 265, § 24C restricts public access to the victim’s name.) Where multiple counts are sought of an identical offense with multiple victims, their names are necessary in order to distinguish the counts for double jeopardy purposes. It is usually appropriate for police to withhold or redact other personal information about victims and witnesses, such as addresses and telephone numbers, from such reports before they are filed with the clerk’s office to protect the privacy interests of the parties. In addition, G.L. c. 258B, § 3(h) specifically authorizes a judge, on request, to impound the address, phone number, or place of employment or school, of a victim, a victim’s family member, or a witness. See Standard 5:00 et seq. about issues of privacy versus public access.

The officer seeking the complaint need not be the arresting officer. See Commentary to Standard 1:01.

If an application for complaint is filed without an accompanying statement of facts, see Standard 2:03.

If, after a warrantless arrest, a complaint is sought for a misdemeanor offense other than the offenses for which the accused was under arrest, he or she is generally entitled to a show cause hearing for that offense. See Standard 3:10.

2:01 Processing the application for complaint

The application for complaint should be processed in an efficient and orderly manner, with regard for the convenience of the parties, the needs of the public, and the public cost incurred when police officers are kept from their other duties.

Applications for complaint should be reviewed by a magistrate or by designated personnel in the clerk's office, and processed early enough so that this does not delay the start of the criminal session at 9:00 A.M.

Commentary

Some applications for complaint relate to accused persons who are in custody. Their guilt or innocence has not yet been adjudicated and they must be promptly released if there is insufficient evidence to establish probable cause.

In courts where a staff member reviews applications for complaint with police officers before they are presented to a magistrate to determine probable cause, when possible this screening function should be assigned to designated personnel who are familiar with the elements of commonly-charged offenses. The clerk-magistrate may reserve this function to a magistrate.

Staff members should be sensitive to the necessary constitutional separation between the functions of the police and the court. Although police officers, prosecutors and defense counsel should be treated as professional colleagues, they should not be afforded special privileges in or about the clerk's office. Such privileges detract from the separate and impartial nature of the court as an independent branch of government.

District Court Special Rules 200 and 201 require that every clerk's office be open for business at 8:30 A.M. and that court sessions begin at 9:00 A.M. The processing of applications for complaints should begin immediately upon opening for business. In courts where it proves necessary, the clerk-magistrate should assign sufficient personnel to begin work before 8:30 A.M. It is not necessary that all complaints for overnight arrests be completed before 9 A.M. if the court has other scheduled matters, but the processing of applications for complaints should not delay the start of the court session. The court should require the cooperation of police departments in meeting the requirements of this standard.

2:02 Determining probable cause

If the application for complaint is in proper order, the officer seeking the complaint should be directed promptly to a magistrate for a probable cause determination.

No criminal complaint may be authorized unless a magistrate determines that probable cause exists for each offense included in that complaint.

If there has already been a *Jenkins* probable cause determination to support continued detention and there is a record of the facts supporting that determination, that is sufficient to authorize a complaint for any offenses covered by that determination.

In determining probable cause, the magistrate may rely on evidence obtained subsequent to the arrest.

Commentary

Because the accused has been arrested, there is no need for a magistrate to make a decision whether to issue process (a summons or a warrant). But a magistrate must determine if probable cause exists to authorize a complaint for each of the offenses being charged. See Mass. R. Crim. P. 3(g).

If probable cause for one or more offenses was found in a prior *Jenkins* hearing, that finding is sufficient to authorize a criminal complaint for those offenses, as long as the underlying facts have been reduced to writing or recorded as Rule 3(g) requires. Anyone arrested without a warrant is entitled to an ex parte *Jenkins* hearing before being held in custody for more than 24 hours when court is not in session. If the magistrate finds that there is probable cause for continued detention, the arrestee may be held for the next court session. If a finding of no probable cause is made, the arrestee must be released. See *Jenkins v. Chief Justice of the District Court Dep't*, 416 Mass. 221, 619 N.E.2d 324 (1993); Mass. R. Crim. P. 3.1; Trial Court Rule XI. If a *Jenkins* determination covers some but not all the charges now being sought, the magistrate must make a supplemental finding of probable cause with regard to the additional offenses.

The same magistrate may not make a *Jenkins* determination and also set bail for a fee in the same case because it poses a potential financial conflict of interest. Trial Court Rule XI. However, the same magistrate who has previously set bail may also make a probable cause determination under Mass. R. Crim. P. 3(g) at a later time, since such a determination is required whether or not the arrestee has been admitted to bail.

The magistrate's responsibility is to determine whether there is currently probable cause to authorize a complaint, not whether there was probable cause at the time of the arrest. Therefore, in determining probable cause the magistrate may consider information obtained subsequent to the arrest. This may be either inculpatory (strengthening the case against the accused) or exculpatory (e.g., showing that an earlier identification was mistaken).

Prior to the September 7, 2004 effective date of Rule 3(g), there was no requirement that a magistrate make a finding of probable cause in warrantless-arrest cases. See *District Atty. of Norfolk County v. Quincy Div. of Dist. Court Dep't*, 444 Mass. 176, 827 N.E.2d 172 (2005); *Commonwealth v. Arias*, 55 Mass. App. Ct. 782, 778 N.E.2d 523 (2002); *Commonwealth v. Rumkin*, 55 Mass. App. Ct. 635, 773 N.E.2d 988 (2002).

For a discussion of the probable cause standard, see Standard 3:18.

2:03 Authorizing the complaint and determining the proper charges

Unless the application for complaint has already been reviewed by another staff member to insure that it contains the necessary identifying information about the accused, the magistrate should do so.

The magistrate must then review the police report or other statement(s) filed with the application to determine whether there is sufficient evidence to find probable cause for each offense charged.

If there is no statement of facts or if the statement does not contain sufficient evidence to find probable cause, the magistrate may permit the officer seeking the complaint to file the missing statement or to supplement or clarify any statement that was filed. The additional facts must either be reduced to writing by the officer, or the magistrate must electronically record or make written notes of them.

If the magistrate determines that there is probable cause for all or some of the offense(s) listed in the application, the magistrate should note this on the application and that he or she is authorizing a complaint. There must be a written or recorded record of the facts supporting the finding of probable cause for each offense.

If the magistrate finds no probable cause for an offense for which the accused was arrested, but does find probable cause for a lesser or different offense, the magistrate should so inform the officer and determine if the officer wishes to proceed on the lesser or different offense. If so, the magistrate may then authorize a complaint. If the officer declines to proceed on the lesser or different offense, the magistrate should note this on the application and record a finding of no probable cause on the original charge.

If the magistrate determines that the facts would also support charging the accused with a greater or different offense, the magistrate may inquire if the officer wishes to do so. If the officer declines to proceed on the greater or different offense, the magistrate should record the finding of probable cause and authorize a complaint for the original charge.

Commentary

The magistrate has two responsibilities under rule 3(g): to determine if probable cause exists for each criminal charge sought in the application for complaint, and to preserve a record of the facts supporting the probable cause finding either in writing or recorded. If either function is omitted, the complaint could later be dismissed.

A written record of the facts supporting the probable cause finding must be filed with the application for complaint. This will normally consist of the police report or statement(s). While a *Jenkins* determination may be based on an unrecorded oral presentation of facts made under oath, that is insufficient under Mass. R. Crim. P. 3(g) unless the facts supporting the finding of probable cause are subsequently “either reduced to writing or recorded.” In doing so, the magistrate is not required to articulate findings of fact assessing the evidence, but only to make a

record of “the facts constituting the basis for the complaint” (i.e., sufficient evidence to support the general finding that there is probable cause for each offense charged).

The magistrate should check the appropriate boxes on the application to indicate the charges for which he or she has found probable cause. The magistrate should also check the appropriate boxes to indicate whether the facts are set forth in written statements or recorded or both. Any written statements, including notes made by the magistrate of any oral statements that were presented, should be attached to the application for complaint, and later filed with the case papers if the magistrate authorizes the complaint. If testimony was recorded, the magistrate should note the start and end index numbers of the electronic record.

If a warrantless arrest is made during business hours, it sometimes happens that the application for complaint is submitted to the court before the police report is available. The magistrate may wait for a reasonable time for the report to be submitted or ask the officer to prepare a brief written report in place of the formal police report. Alternately, the magistrate may interview the officer, either in the clerk’s office or over the telephone, and record the testimony or make notes of the facts presented. These notes do not have to be extensive but they must record the substance of the factual basis for each element of each offense charged and must be preserved.

The magistrate may use his or her expertise to advise on the selection of the appropriate offense to be charged, based on the facts presented. Ultimately, however, the charging decision is an executive, not a judicial, function, and the police may choose to prosecute for a lesser offense, even if there is probable cause for a more serious charge. The magistrate should adopt the officer’s choice of offense if there is probable cause for that offense.

For a discussion of taking the complainant’s oath and signing the complaint, see Standard 3:24.

2:04 Denying an application after arrest

If the police fail to file a written statement or offer oral testimony, preserved by recording, that provides probable cause for every element of a charged offense, the magistrate may not authorize a complaint for that offense. Normally the magistrate should require that this obligation be met by the submission of a written statement that covers every element of the offense.

The magistrate should deny a complaint for a charged offense only if he or she finds no probable cause or has not been provided with the facts necessary to determine whether there is probable cause for that offense.

If the magistrate does not find probable cause for any of the charged offenses, the magistrate should mark the application “No Probable Cause Found” and with the date and time. The denied application for complaint should then be sent into the courtroom and placed before a judge. If the accused is in custody, the matter should be called without delay. Unless the police request redetermination by a judge (see Standard 2:05), the magistrate’s finding of no probable cause should be announced in open court and on the record. If a check of the Warrant Management System and the arrestee’s probation record reveals no outstanding warrants, the arrestee should be discharged. Any posted bail should be returned. If a motor vehicle citation was issued, an abstract should be sent to the Registry of Motor Vehicles noting the finding of no probable cause.

If no judge is sitting that day, the clerk in the session should call the matter and, after a check of the WMS and the arrestee’s probation record, announce the finding and the arrestee’s discharge on the record.

Commentary

District/Mun. Cts. R. Crim. P. 2(a) and 3(a) require a magistrate, before authorizing a criminal complaint in an arrest case, to obtain from the police “a written statement describing the facts constituting the basis for the arrest” to be given to the defendant at arraignment. The commentary to the rules indicates that the purpose of this written statement is to implement the discovery requirement of G.L. c. 218, § 26A (and now Mass. R. Crim. P. 14[a][1][A]), and not to document every element of the offense for purposes of determining probable cause.

By contrast, Massachusetts R. Crim. P. 3(g) requires a magistrate, before issuing a complaint, to obtain from the complainant “the facts constituting the basis for the complaint . . . either reduced to writing or recorded . . . [which] establish[] probable cause” for an offense.

The first of these requirements can only be met by a written statement, while the second may also be satisfied by electronic recording of oral testimony. The standard suggests that normally both requirements should be met by the filing of a written statement that establishes probable cause for every element of the offense.

Massachusetts R. Crim. P. 3(g) is silent as to what should happen if the magistrate finds

no probable cause as to all charges sought. If the police indicate that missing information can be obtained quickly (perhaps with a phone call to the police station or the arresting officer), the magistrate may defer taking any action for a short period of time to permit the police to revise or supplement the original report. The supplemental information must be in writing or otherwise recorded.

If the magistrate finds no probable cause to authorize the complaint or the police are not able to provide facts to support the authorization of a complaint within a reasonable time, the application should be put before a judge in the courtroom so that the arrestee may be ordered released. What constitutes a reasonable time will depend upon the nature of the charges, the complexity of the matter, and the availability of witnesses or police officers, but in no event would it extend beyond the end of the court day.

Several considerations support the recommendation to bring the matter before a judge:

- If the police disagree with the magistrate's decision not to authorize a complaint, it is appropriate that they be given an opportunity to request a redetermination by a judge. The arrestee is often already in the courtroom, either in the general audience or, if held, in the dock.
- Resolving the matter in the courtroom is an appropriate way to allow for involvement by the District Attorney's office, which does not usually participate in the application process in the clerk's office.
- Protecting the arrestee's privacy is rarely a significant concern in such situations. After the opprobrium of a public arrest and sometimes incident publicity, an arrestee may well desire his or her discharge to be equally public. In addition, the public's legitimate interest in controversial law enforcement decisions may often result in a discretionary decision to permit public access to the records of such cases. See Standard 5:02.
- Several additional steps must precede any discharge. By statute the court must check the Warrant Management System for outstanding warrants before it "releases, discharges or admits to bail" the arrestee (G.L. c. 276, § 29), and it is also appropriate to check the arrestee's probation record for outstanding defaults or other pending matters. If the arrestee is on probation, the probation department should have an opportunity to determine whether to file a violation notice for any conduct brought to light in the police report(s) or statement(s). Calling the case in the courtroom insures that such issues are addressed before the arrestee is discharged.
- Releasing an arrestee directly from the cellblock with no appearance in open court may leave the alleged victim, prosecuting officers and interested members of the public or media uncertain as to what has occurred. Since the arrest has already put the matter in the public realm, it is appropriate for the court to encourage public confidence in its charging procedures by formally noting on the record that a judicial determination of no probable cause has been made and that is why the arrestee is being discharged and released pursuant to law.

The denied application must be kept on file for the one year retention period required by G.L. c. 218, § 35.

A finding of no probable cause does not bar police from later bringing a new application for complaint based on new or additional evidence, nor does it bar the District Attorney from seeking an indictment for the same charge(s). A new application should be processed de novo.

When an arrestee has previously been released on bail and the magistrate finds no probable cause to authorize a complaint, if the arrestee fails to appear in accordance with his or her recognizance, the court should not issue a warrant. A judge must determine whether the circumstances make it appropriate to return or to forfeit any bail that has been posted. In such circumstances, if the police wish to seek a separate complaint under G.L. c. 276, § 82A for failure to appear, they should be urged to consult first with the District Attorney's office.

2:05 Redetermination by a judge after a magistrate's finding of no probable cause

If the police disagree with the magistrate's decision not to authorize a complaint, they may request a redetermination by a judge.

If the arrestee is being held, this should be treated as a matter of priority, since the magistrate has already made a decision that there is no probable cause to authorize a complaint. It must be done, at the very latest, before the close of business on the same day that the arrestee is first brought before the court, unless the arrestee is released on personal recognizance pending resolution, if it cannot be done immediately, or both parties agree to a delay, or there are independent grounds for continued detention.

A judge may decide to rehear the application de novo or simply to review the factual allegations previously provided to the magistrate. The proceeding may be conducted ex parte, since an arrestee has no right to be heard before a complaint is authorized, or the judge may allow participation by the arrestee or defense counsel. The judge may limit any redetermination to the information previously provided to the magistrate, or may allow additional information to be offered.

If a judge agrees to redetermine the matter, any hearing should presumptively be private and closed to the public. When there is a request that the public be permitted to attend, the judge should be guided by the factors in Standard 3:15 in determining whether there is a legitimate reason for access that justifies an exception to the rule.

If the judge determines that there is no probable cause for a complaint, the session clerk should endorse that finding on the application for complaint and the arrestee should be released and discharged after a check of the Warrant Management System and the arrestee's probation record.

When no judge is present, the clerk-magistrate should request an immediate judicial redetermination through the same procedure used to obtain abuse prevention orders when no judge is sitting.

Commentary

Under G.L. c. 218, §§ 32 & 35 and G.L. c. 276, § 22, a judge has coextensive authority with a magistrate to authorize criminal complaints. The judge also has inherent authority to redetermine an application for criminal complaint that has been denied by a magistrate. *Bradford v. Knights*, 427 Mass. 748, 752, 695 N.E.2d 1068, 1071 (1980).

If the judge finds no probable cause for the complaint, the session clerk should endorse that finding on the application for complaint, and note the judge's name, the date and time, and the start and end index numbers of the electronic record.

2:06 Withdrawing an application after arrest

If the police decide to withdraw an application for complaint and release an arrestee, the magistrate should note the details and reasons on the withdrawn application and retain it with denied applications.

If this occurs after the arrestee has been transferred into the court's custody, the withdrawn application for complaint should be sent immediately to the courtroom and the matter called without delay. After review by the judge, the withdrawal of the application for complaint and the arrestee's discharge should be announced in open court and on the record. If no judge is sitting that day, the clerk in the session should call the case and announce on the record the withdrawal of the application and the arrestee's discharge.

The magistrate and the judge should not become involved in an arrestee's decision whether to release the police from any civil liability.

Commentary

On occasion, police officers may decide not to prosecute after a warrantless arrest has been made. They may be required to do so if additional information has come to light so that there is no longer probable cause to proceed. See *Hall v. Ochs*, 817 F.2d 920 (1st Cir. 1987) (Fourth Amendment requires that police release arrestee as soon as they learn they have arrested wrong person); S.J.C. Rule 3:07, § 3.8(a) (prosecutor may not prosecute a charge that is not supported by probable cause).

In appropriate cases, the magistrate might suggest that the police consult with the District Attorney's office before reaching a decision whether or not to prosecute after an arrest.

Judges and magistrates should not become involved in an arrestee's decision whether to release the police from civil liability. It is improper for the court to use the criminal process as a tool to affect questions of civil liability arising out of the arrest or complaint process. *Foley v. Lowell Div. of the Dist. Court Dep't*, 398 Mass. 800, 804-805, 501 N.E.2d 1151 (1986); *Enbinder v. Commonwealth*, 368 Mass. 214, 220, 330 N.E.2d 846, cert. denied, 423 U.S. 1024 (1975). See also *Newton v. Rumery*, 480 U.S. 386, 107 S.Ct. 1187 (1987) (plurality opinion) (validity of civil release depends on accused's informed and voluntary consent and no evidence of prosecutorial misconduct); *Commonwealth v. Klein*, 400 Mass. 309, 311-312, 509 N.E.2d 265, 266 (1987) (permissible for judge to enforce civil release negotiated by counsel without court involvement as part of negotiated settlement).

For record requirements on denied applications, see Standard 5:01.

WHEN THE ACCUSED HAS NOT BEEN ARRESTED
(Standards 3:00 through 3:26)

3:00 The right to seek a criminal complaint

Any individual is entitled to file an application for criminal complaint and to have a magistrate act on it. However, a private party has no right to a show cause hearing on such an application, no right to have a criminal complaint authorized, and no right to appeal its denial.

Unless the Attorney General's office or the District Attorney's office has communicated a decision to prosecute, a magistrate may decline to authorize a complaint even if there is probable cause. If the Attorney General's office or the District Attorney's office has decided to prosecute, a magistrate must authorize the requested complaint if supported by probable cause. A magistrate may ordinarily assume that the District Attorney's office will prosecute a complaint supported by probable cause that is sought by police or other authorized law enforcement officials, but may also inquire in doubtful cases.

Where a magistrate is permitted to deny an application for complaint even if there is probable cause, the magistrate may do so summarily and without hearing. A court may establish policies regarding the types of applications from private parties that will be denied summarily.

Commentary

“In general, anyone may make a criminal complaint in a District Court who is competent to make oath to it.” *Commonwealth v. Haddad*, 364 Mass. 795, 798, 308 N.E.2d 899 (1974). See Mass. R. Crim. P. 4(b) and Standard 1:01. For that reason, the complainant must be a natural party, even if acting on behalf of an agency or organization.

A private party has a right to file an application for criminal complaint and to have the court act on that application, but that is the extent of his or her rights. A private complainant is not entitled to a hearing on an application, since the statutory provisions for show cause hearings are for the benefit of the accused, not the complainant. *Scott v. Dedham Div. of Dist. Court Dep't*, 436 Mass. 1004, 1005, 763 N.E.2d 1088, 1089 (2002); *Commonwealth v. Clerk of Boston Div. of Juvenile Court Dep't*, 432 Mass. 693, 703, 738 N.E.2d 1124, 1131 (2000). “Once a private party alerts the court of the alleged criminal activity through the filing of an application and the court responds to that application, the private party's rights have been satisfied.” *Victory Distribs., Inc. v. Ayer Div. of Dist. Court Dep't*, 435 Mass 136, 141, 755 N.E.2d 273, 277-278 (2001). See also *Taylor v. Newton Div. of Dist. Court Dep't*, 416 Mass 1006, 622 N.E.2d 261 (1993) (“it is settled beyond cavil that a private citizen has no judicially cognizable interest in the prosecution of another”).

A magistrate has discretion to decline to authorize a criminal complaint even if the

application establishes probable cause, unless the Attorney General's office or the District Attorney's office has communicated to the court a decision to prosecute. In such situations, "neither a judge of the District Court nor a clerk-magistrate may bar the prosecution, as long as the complaint is legally valid." *Victory Distribs., Inc.*, 435 Mass. at 143, 755 N.E.2d at 279.

While private applications for complaint may be denied summarily, they should not be denied arbitrarily. The court should not appear to favor one complainant over another who is similarly-situated by authorizing a complaint for one and denying it for the other if there is probable cause for both complaints. For that reason, it is desirable that summary denials should normally be done in accordance with a uniform policy. See, e.g., *Victory Distribs., Inc.*, *supra* (court may follow a policy of denying private complaints for larceny by check because it lacked resources to process such cases).

The significance of the court's involvement in resolving applications brought by private parties should not be underestimated. "[T]hese often more minor matters may include the frictions and altercations of daily life, which may not attract the attention of the police or the public prosecutor but yet may rankle enough that resolution is required if peace is to be maintained." *Bradford v. Knights*, 427 Mass. 748, 751, 695 N.E.2d 1068, 1071 (1998). A magistrate's show cause hearing may be the only practical recourse available to an unrepresented complainant if the police are unable or unwilling to investigate or commence prosecution in a relatively minor matter.

A magistrate may not hold an application for complaint open indefinitely or for an extended term, without either allowing or denying it, over the objection of the complainant or the Commonwealth. *Commonwealth v. Clerk of Boston Div. of Juvenile Court Dep't*, *supra*.

3:01 Purpose of the complaint procedure in non-arrest cases

The primary objective of the complaint procedure in non-arrest cases is to determine whether to authorize a criminal complaint to prosecute the accused for alleged criminal acts. The court may also play a useful function in the informal resolution of conflicts if this is done in a manner that is consistent with the primary objective of the complaint procedure.

Commentary

The primary role of the magistrate is to determine whether probable cause exists to require the accused to answer to a criminal charge. However, magistrates may decline to authorize complaints where the law allows the conflict to be fairly resolved in a different manner. In *Gordon v. Fay*, 382 Mass. 64, 69-70, 413 N.E.2d 1094, 1097-1098 (1980), the Supreme Judicial Court noted that the “implicit purpose of the [G.L. c. 218, §] 35A hearings is to enable the court clerk to screen a variety of minor criminal or potentially criminal matters out of the criminal justice system through a combination of counseling, discussion, or threat of prosecution.”

Resolution of local conflicts short of authorizing a criminal complaint is at times desirable, but such informal dispositions are only incidental to the primary role of the court. It is the magistrate’s fortuitous presence as a source of authority at this critical junction that permits him or her to play the role of “mediator.”

The magistrate may occupy this role only to the extent that the parties are willing to permit. While the magistrate should make known the court’s availability as a mechanism of less formal dispute settlement, he or she cannot thrust the court into that role if the parties are unwilling. If the complainant or the accused are not interested in the court’s assistance except to determine whether a complaint should be authorized, that decision must be respected.

Even where there is probable cause, if the magistrate has reason to believe that the District Attorney’s office might not wish to prosecute a particular offense, the magistrate has the option of deferring decision and inquiring of the District Attorney’s office. If the District Attorney’s office declines to prosecute (often because the matter is relatively minor or can be litigated civilly), the magistrate should give serious consideration before authorizing a complaint, since it is usually desirable that decisions involving prosecutorial discretion be made by “the people’s elected advocate.” *Commonwealth v. Gordon*, 410 Mass. 498, 500, 574 N.E.2d 974, 976 (1991).

3:02 The independence and impartiality of the court

The magistrate should be impartial and exercise independent judgment and should avoid any appearance of partiality.

Only court personnel should carry out court functions. A conscious effort should be made to avoid giving special privileges to lawyers or to police officers and other members of the criminal justice community, and to maintain a proper professional relationship with them. They should not be permitted to have custody of court documents or case files or be permitted in areas set aside for court personnel except under appropriately supervised circumstances.

The magistrate may provide inquirers with neutral guidance and information regarding court procedures, but must decline to offer advice on whether to file an application or on how to advocate for the authorization of a complaint. When necessary, the magistrate should explain that he or she is permitted to provide neutral information to assist in the making of an informed choice, but may not offer advice on whether to pursue any particular course of action. If appropriate, the magistrate may suggest that a person seek assistance from the police, the district attorney's office, or an attorney. The magistrate may not suggest the names of specific attorneys, but may direct an inquirer to a bar association's attorney referral service.

Applications for complaint that involve court personnel, their close family members or domestic partners, or persons having personal or business relationships with court personnel must be brought to the attention of the Regional Administrative Judge for possible transfer to another division or in order to have a magistrate from another division determine the application.

When an application is filed against a police officer employed within that court's territory, or against a local municipal employee or other individual who has close personal or business ties with that division, strong consideration should be given to asking the Regional Administrative Justice either to transfer the matter to another division or to assign a magistrate from another division to determine the application.

Commentary

See S.J.C. Rules 3:09, Canon 2, and 3:12, Canon 4(A).

Preserving the independence and impartiality of the court can pose a challenge especially in the context of a local court, a small police force and a limited number of attorneys, all of whom must interact on a regular basis.

It is not the role of a magistrate to advise anyone to bring a problem before the court or to suggest how to proceed. Magistrates and court employees may not provide legal advice, but may inform a person of the right to seek advice from an attorney, the police, or the District Attorney's office. They may provide guidance and assistance in helping parties to understand

court procedures and in the mechanics of completing forms, if they do so in an equitable and neutral way, equally to all parties to a proceeding. See SJC Advisory Committee on Ethical Opinions for Clerks of the Courts, Opinion 95-6 (November 8, 1995) (available at www.mass.gov/courts/sjc/aceocc/95_6.html).

Citizens may be referred from the court to the police. The police may have a legitimate role to play in the complaint procedure, such as in an investigative capacity (See Standard 3:06), even where they are not the complainant. But their assistance should be sought only in aid of and not in place of the court, and the relationship should not be permitted to appear otherwise. Judges and magistrates should be vigilant to preserve the separate identity and impartiality of the court.

For the District Court Department's detailed policy on litigation involving court personnel or their household or family members, see Administrative Regulation No. 1-06 (Trans. 984, May 12, 2008).

3:03 Completing the application

An application for complaint should be filled out completely by every person who seeks the aid of the court in instituting criminal proceedings. Since a complainant is required to convey to the court the facts constituting the basis for the complaint, a statement of facts should also be completed. Police officers may submit a police report or similar statement to satisfy this requirement.

The completed application should preliminarily be reviewed by a magistrate to determine whether it is appropriate to immediately authorize or deny a complaint, or refer the complainant to the police or the District Attorney, or suggest a resolution without the institution of criminal proceedings, or whether the complainant needs to amplify the facts contained in the application. If such review must be postponed because no magistrate is immediately available, it is desirable that a designated staff member who is familiar with the elements of commonly-charged offenses check the application for completeness while the complainant is still present.

If the application is of a nature that is routinely scheduled for hearing, the clerk-magistrate may permit a designated staff member to do so. All other applications should be reviewed by a magistrate prior to any action being taken on them.

A private party seeking a misdemeanor complaint must either pay the statutory filing fee (currently \$15) or obtain a waiver before his or her application may be filed and considered.

Commentary

An application for complaint should be completed on the standard “Application for Complaint” (DC-CR-2) form. Court personnel must insure that complainants supply adequate and complete identifying information about the accused (i.e., full name, date of birth, address, etc.) unless a waiver is given for good reason. See also G.L. c. 276, § 23A (unless waived by clerk-magistrate, any individual or law enforcement agency requesting court to issue warrant must provide person’s name, last known address, date of birth, gender, race, height, weight, hair and eye color, any known aliases, and other information required for warrant to be accepted by the Commonwealth’s computerized Criminal Justice Information System).

Court personnel must also insure compliance with the requirement of Mass. R. Crim. P. 3(g) to make a record of the facts relied upon by the magistrate in determining probable cause. Police officers should submit a police report or similar statement. Private complainants should normally write out a statement of facts on the supplemental “Statement of Facts in Support of Application for Criminal Complaint” (DC-CR-34) form or a local alternative. This should normally be done by complainants on their own, as best they can. Clerks and support staff should not advise a complainant about what to put in a statement, but may assist complainants with physical handicaps or limited literacy when necessary. If the magistrate acting on the application needs more information or clarification, the magistrate may request the complainant to supplement the original statement in writing, or orally if the magistrate then makes written

notes or an electronic record of the statement.

Private complainants seeking a misdemeanor complaint must pay the \$15 filing fee required by G.L. c. 10, § 35Z unless it is waived pursuant to the Indigent Court Costs Law (G.L. c. 261, §§ 27A-27G). The special requirements imposed by G.L. c. 261, § 29 on prisoners who seek to waive civil filing fees are not applicable to criminal proceedings. See *Commonwealth v. De'Amicis*, 450 Mass. 271, 877 N.E.2d 925 (2007).

Every application for complaint should be assigned a docket number in a standard format consisting of a 2-digit calendar year code, followed by a 2-digit court code, followed by the "AC" case type code, followed by a sequential case number (e.g. "08 54 AC 123"). Such numbering is mandatory for all misdemeanor applications from private complainants, since the application form is the fiscal control document for the payment or waiver of the required filing fee. Trial Court FY 2005 Fiscal Memo No. 5 (August 31, 2004).

3:04 Interviewing the complainant; Venue; Statute of limitations

A magistrate should be available during ordinary business hours to act upon applications for complaint that require immediate attention.

The magistrate's initial task is to triage what course the application should take: whether an immediate decision should be made to authorize or deny a complaint, or instead schedule the matter for a show cause hearing, refer the complainant to the police or the District Attorney's office, or suggest a resolution without the institution of criminal proceedings.

Any inquiries posed to a private complainant to amplify the facts contained in the application should be carried out only by a magistrate. Depending on the nature of the allegations, such inquiries should be made in as private a setting as appropriate.

Any facts presented to the magistrate to support or oppose a finding of probable cause for the complaint should be given under oath or affirmation. A record must be made of any written or oral evidence on which the magistrate relies to establish probable cause for the complaint.

The magistrate should deny an application if that division is not the proper venue for prosecution of the alleged offense.

The magistrate should deny an application by a prisoner based on an incident arising out of his or her confinement until the prisoner has exhausted available administrative grievance procedures.

The magistrate may consider denying an application if he or she determines that the statute of limitations has expired, unless the District Attorney's office disagrees and wishes to prosecute.

Commentary

All District Court divisions are open for business from 8:30 A.M. to 4:30 P.M. and must be organized to provide essential services during those hours. While magistrates have many other responsibilities, acting on applications for complaint that are time-sensitive is a priority matter. It should be clear who has been assigned to this responsibility at all times that the court is open.

When complainants are interviewed to elaborate on the facts outlined in their applications, such questioning should be done only by a magistrate.

Criminal acts that involve embarrassing or sensitive situations require special attention to privacy. In such situations, private complainants should not be interviewed "over the counter." These can be difficult and emotionally-charged encounters for complainants and interviews should be done in a more private setting, where the conversation will not be overheard by others.

If the complainant discloses information in the interview which has not been reduced to writing, the magistrate must decide whether such supplemental information is essential to establishing probable cause to authorize a complaint. If so, the magistrate must comply with the requirement of Mass. R. Crim. P. 3(g) to preserve a record of “the facts constituting the basis for the complaint,” either by having the complainant add those facts to his or her written statement, or by the magistrate making written notes of or electronically recording the complainant’s oral statements.

See Standards 3:07 through 3:11 for further discussion of the options available to the magistrate after interviewing the complainant.

Neither the “Application for Complaint” form nor the supplemental “Statement of Facts” form requires a signature under oath. However, the magistrate must “examine on oath the complainant and any witnesses produced by him, reduce the complaint to writing, and cause it to be subscribed by the complainant.” G.L. c. 276, § 22. “The preferred procedure would be to administer the oath before the complainant makes statements which could serve as the basis for the issuance of process.” *Commonwealth v. Cote*, 15 Mass. App. Ct. 229, 237, 444 N.E.2d 1282, 1288 (1983). The magistrate is not required to document that the complainant and other witnesses were examined on oath. *Id.*

Venue. In the District Court, venue is usually identical to jurisdiction, since the 62 District Court divisions are established by G.L. c. 218, § 1 as separate tribunals of limited geographical jurisdiction. *Commonwealth v. Leach*, 246 Mass. 464, 471-472, 141 N.E. 301, 302 (1923). Generally an alleged offense must be prosecuted within the judicial district where it occurred or within 50 rods (825 feet) of the boundary of the district. Some offenses may be prosecuted in more than one court. See G.L. c. 277, §§ 57-62B.

Criminal cases may be transferred to another division for appropriate reasons. See, e.g., G.L. c. 211B, § 9 (interdepartmental transfer by Trial Court’s Chief Justice for Administration and Management), G.L. c. 211B, § 10 (interdivisional transfer by departmental Chief Justice), G.L. c. 218, § 27A (transfer to designated trial session), Mass. R. Crim. P. 37(b)(1) (transfer by trial judge to obtain impartial jury), and Mass. R. Crim. P. 37(a)(1) & (b)(2) (transfer by motion judge for consolidation for plea or trial).

Prisoner’s exhaustion of grievance procedures. By statute, prisoners may not “file any claim” for incidents “arising out of or resulting from a condition of or occurrence during confinement” until they have exhausted available administrative grievance procedures, unless the grievance has gone undecided for 180 days or there are exigent circumstances which “jeopardize the life or seriously impair the health of the inmate.” G.L. c. 127, § 38F. While no appellate court has yet considered the issue, this may encompass applications for criminal complaints. See District Court Transmittal No. 727, Item 5 (December 23, 1999) (concluding that the term “claim” in § 38F includes criminal applications).

Statute of limitations. A claim that prosecution of a particular offense is barred by the statute of limitations (G.L. c. 277, § 63) is usually a matter of defense that is waived if not raised by the accused. However, it appears that the discretion granted by *Victory Distribs., Inc. v. Ayer Div. of Dist. Court Dep’t*, 435 Mass 136, 755 N.E.2d 273 (2001), would permit a magistrate to

consider the issue sua sponte, and to decline to issue a complaint where the magistrate determines that it is time-barred unless the Attorney General's office or the District Attorney's office disagrees.

See Standard 3:14 on the effect of a police failure to give the accused a copy of the motor vehicle citation at the time and place of the violation or to deliver a copy of the citation to the court within six business days.

3:05 Complaint inquiries

Support personnel should not predict the probable outcome of an application or offer advice to the complainant as to whether or not to proceed with the application. Support personnel should not recommend alternative solutions to the problem giving rise to the application. An applicant posing such questions should be referred to a magistrate.

Commentary

While a magistrate may suggest the probable outcome of an application and, in appropriate situations, recommend consideration of alternative non-criminal solutions, other court employees should not do so.

3:06 Referrals to the police

If a private complainant wishes to file an application without initially consulting the police he or she must be permitted to do so.

A magistrate may defer action on an application by a private complainant and refer the complainant to the police when the magistrate believes that further investigation or other assistance would be helpful. Such referrals should be made only by a magistrate, and should not be made routinely. Complainants should be informed that if they are not satisfied with the assistance offered by the police, they should return to the court to ask that action be taken on the application.

Commentary

In appropriate situations, a magistrate may refer a private complainant to the police for further investigation or other assistance. Such referrals should be on a case-by-case basis and not made automatically. Persons referred to the police by a magistrate should not be given the impression that they are being diverted from the court, but instead that the referral is being made to assist the court in exercising its decision-making responsibility. They should be assured that if they are not satisfied with the assistance offered by the police, they should return to the court and the magistrate will take appropriate action on the application.

When a private complainant is referred to the police, it is often helpful for the magistrate to involve the police liaison for that police department. After speaking with the complainant, the police liaison can best direct him or her in obtaining further assistance.

In similar manner, parties seeking assistance are often referred by the police to the court. Whichever direction a referral is made, it is important that applicants not feel that they are being shunted between the court and the police, with neither interested in offering assistance.

3:07 Determining a private complainant's objective

When in doubt, the magistrate should endeavor to determine through the interview whether the accusation of criminal conduct constitutes a request to institute criminal proceedings or merely a generalized request for assistance.

Where the complainant is certain that he or she wishes to institute criminal proceedings, the magistrate should proceed accordingly.

A complainant making a generalized request for assistance may be directed to any available resource and helped in any way appropriate. The magistrate may refer the case to the police if the facts appear to justify such action.

If a complainant is uncertain how he or she wants to proceed, the complainant should be given time to consider his or her options unless public safety concerns require affirmative action by the court.

Commentary

Some of those who come to the District Court to report alleged criminal conduct are not certain about how they want to proceed. All that is certain is that they have a problem and want to talk about it with someone in authority.

Although the complainant's wish is not controlling – since the Commonwealth is the real party in interest in a criminal prosecution – it is an important factor in the magistrate's decision about how to proceed. The interests of a private applicant may be recognized as long as they are not outweighed by the public's interest in justice and public safety.

Since the initiation of criminal proceedings is a serious step with potentially significant consequences, in appropriate cases the magistrate should attempt to explore the complainant's real objective. If it is indeed to initiate a criminal prosecution, the magistrate must either authorize or deny the complaint. An informal disposition cannot be imposed by the magistrate; it may be used only when the complainant voluntarily accepts it. (See Standard 3:03 with regard to the provision of advice to the complainant.)

3:08 Felony charges sought by law enforcement officers

A law enforcement officer bringing an application for complaint for a felony charge is entitled on request to an immediate determination by the magistrate, without a show cause hearing, whether or not there is probable cause to authorize a criminal complaint.

The magistrate is required to schedule a felony application for a show cause hearing if the police complainant so requests and the three statutory exceptions in G.L. c. 218, § 35A do not apply. If the police complainant has not requested a show cause hearing but it appears that a hearing is appropriate, the magistrate may inquire whether the complainant objects to the scheduling of a hearing.

Whether or not a show cause hearing is held in such cases, the magistrate must authorize a felony complaint sought by a law enforcement officer if there is probable cause for the complaint, but may decline to do so if the District Attorney's office has communicated to the court its opposition to authorizing the complaint.

If the officer requests a warrant, the magistrate should determine whether the statutory exception to the preference for a summons applies. If it does, the magistrate should order a warrant to issue. Otherwise, the magistrate should order that a summons issue.

Commentary

Commonwealth v. Clerk-Magistrate of W. Roxbury Div. of Dist. Court Dep't, 439 Mass. 352, 787 N.E.2d 1032 (2003), held that a magistrate has no authority under G.L. c. 218, § 35A, to schedule an application for complaint for a show cause hearing when the charge is a felony. The Legislature subsequently amended the statute. See St. 2004, c. 149, § 200. Under amended § 35A, the magistrate must schedule a show cause hearing for a felony application brought by a law enforcement officer if the officer so requests. If the police do not consent to the magistrate holding such a hearing, the magistrate must promptly grant or deny the application without a show cause hearing.

For the three statutory exceptions when a show cause hearing is not to be conducted, see Standard 3:11.

The magistrate must authorize the complaint if there is probable cause for the offense(s) sought, but may decline to do so if the Attorney General's office or the District Attorney's office opposes its authorization. See Standard 3:00.

General Laws c. 276, § 24 and Mass. R. Crim. P. 6 state a preference for a summons rather than a warrant. See Standard 3:25 on applying the exception "based on the representation of a prosecutor made to the court that the defendant may not appear unless arrested."

3:09 Felony charges sought by private complainants

If a complainant other than a law enforcement officer files an application for complaint for a felony charge, the magistrate has discretion whether to schedule a show cause hearing to give the accused an opportunity to be heard. However, a magistrate may not schedule such a hearing if there is imminent threat of bodily injury, commission of a crime, or flight from the Commonwealth by the accused.

It is preferable that applications by private complainants be decided after providing the accused an opportunity to be heard unless there are public safety or other reasons for not doing so.

Commentary

A private complainant is entitled to file an application for complaint for a felony and to have a magistrate act on it, but has no right to have a show cause hearing scheduled or a complaint authorized. See Standard 3:00.

A magistrate has considerable discretion whether to schedule a show cause hearing when a private complainant seeks a complaint for a felony. A magistrate is required to determine probable cause without scheduling a hearing if any of the three exceptions listed in G.L. c. 218, § 35A apply. See Standard 3:11.

In exercising such discretion, a magistrate should not act arbitrarily or capriciously and should strive to be consistent in similar cases. A felony application that involves serious charges for which probable cause exists should rarely be denied as a matter of discretion in the absence of articulable reasons, if there may be a continuing danger to the complainant or the public.

If an application contains both felony and misdemeanor charges, the accused is not entitled to a hearing. *Commonwealth v. Cote*, 15 Mass. App. Ct. 229, 444 N.E.2d 1282 (1983). However, if it is uncertain whether there is probable cause for the felony charge but there may be probable cause for a lesser misdemeanor charge, it is appropriate to schedule a show cause hearing if none of the three exceptions apply.

3:10 Misdemeanor charges

By statute, persons accused of committing a misdemeanor are generally entitled to an opportunity to be heard in opposition to the complaint. A misdemeanor is a crime which may not be punished with a state prison sentence.

This requirement does not apply (1) if the accused has been under arrest for the offense(s) for which the complaint is sought, (2) if there is an accompanying felony charge, (3) if the application for complaint is denied summarily, or (4) if the magistrate decides that there is an imminent threat of bodily injury, commission of a crime, or flight from the Commonwealth by the accused.

A show cause hearing should be scheduled for this purpose and written notice of the time and place of the hearing provided to both the complainant and the accused.

Commentary

An accused has a right to be heard before a complaint is authorized only when the application is solely for a misdemeanor, no arrest has taken place for that offense, the complaint has not been summarily denied, and none of the exceptions listed in Standard 3:11 is present. See G.L. c. 218, § 35A (accused entitled to opportunity for show cause hearing on application for misdemeanor complaint unless “under arrest for the offense for which the complaint is made [or] there is an imminent threat of bodily injury, of the commission of a crime, or of flight from the commonwealth”); *Commonwealth v. Cote*, 15 Mass. App. Ct. 229, 236, 444 N.E.2d 1282 (1983) (§ 35A entitles accused to opportunity for show cause hearing solely where “the events underlying the complaint give rise *only* to misdemeanor complaints”).

Generally a police officer is authorized to arrest without a warrant for a misdemeanor that occurs in the officer’s presence and for the misdemeanors listed in G.L. c. 276, § 28.

See Standard 3:12 concerning the results of failing to schedule a required show cause hearing. For procedures for motor vehicle misdemeanors, see Standard 3:13.

A private complainant is entitled to file an application for complaint for a misdemeanor and to have a magistrate act on it, but has no right to have a show cause hearing scheduled or a complaint authorized. See Standard 3:00.

3:11 Exceptions to a show cause hearing

General Laws c. 218, § 35A identifies three situations in which the court may not schedule a show cause hearing. The magistrate should note on the application form when one of these three reasons causes an application to be decided without notice to the accused.

A. Imminent threat of bodily injury

If the accused poses an imminent threat of causing bodily injury, the magistrate must determine whether to authorize or deny the complaint without scheduling a show cause hearing. In determining this, the magistrate is to consult the accused’s criminal record and the statewide registry of abuse restraining orders.

B. Imminent threat of committing a crime

If the accused poses an imminent risk of committing another crime before a show cause hearing can be held, the magistrate must determine whether to authorize or deny the complaint without scheduling a show cause hearing.

C. Imminent likelihood of flight

If the accused poses an imminent risk of fleeing the Commonwealth before a show cause hearing can be held, the magistrate must determine whether to authorize or deny the complaint without scheduling a show cause hearing. The factors to be considered in setting bail may provide useful guidance in determining likelihood of flight.

There is also no need for a show cause hearing if the application for complaint has been summarily denied by a magistrate. See Standard 3:00.

Commentary

See G.L. c. 218, § 35A. These exceptions are aimed at preventing various forms of retaliation or flight by the accused upon receiving notice of the application for complaint. *Gordon v. Fay*, 382 Mass. 64, 72, 413 N.E.2d 1094, 1099 (1980).

Section 35A directs that the magistrate “shall consider the named defendant’s criminal record and the records contained within the statewide domestic violence record keeping system maintained by the office of the commissioner of probation in determining whether an imminent threat of bodily injury exists.”

The factors enumerated in G.L. c. 276, § 58 to be considered in setting bail may also be helpful in determining whether any of the three exceptions applies. These include: “the nature and circumstances of the offense charged, the potential penalty the person faces, the person’s family ties, financial resources, employment record and history of mental illness, his reputation and the length of residence in the community, his record of convictions, if any, any illegal drug distribution or present drug dependency, any flight to avoid prosecution or fraudulent use of an

alias or false identification, any failure to appear at any court proceeding to answer to an offense, whether the person is on bail pending adjudication of a prior charge, whether the acts alleged involve abuse as defined in [G.L. c. 209A, § 1], or violation of a temporary or permanent order issued pursuant to [G.L. c. 209, §§ 18 or 34B, G.L. c. 209, § 32, G.L. c. 209A, §§ 3, 4 or 5, or G.L. c. 209C, §§ 15 or 20], whether the person has any history of orders issued against him pursuant to the aforesaid sections, whether he is on probation, parole, or other release pending completion of sentence for any conviction, and whether he is on release pending sentence or appeal for any conviction.”

Applications for complaint for the misdemeanor of violating an abuse restraining order (G.L. c. 209A, § 7) are not automatically exempt from the requirement of a show cause hearing, but one of the three statutory exemptions may apply in such cases. *Commonwealth v. Irick*, 58 Mass. App. Ct. 129, 132-133, 788 N.E.2d 573, 575-576 (2003)

3:12 Failure to schedule a show cause hearing

An accused charged with a felony is not entitled to a show cause hearing.

If none of the exceptions apply, an accused charged only with a misdemeanor who is deprived of his or her right to a show cause hearing is entitled to dismissal of the complaint without prejudice.

Commentary

General Laws c. 218, § 35A does not give an accused charged with a felony any right to a show cause hearing. Apart from § 35A, an accused has no right to be heard prior to a complaint being authorized. *Commonwealth v. Smallwood*, 379 Mass. 878, 401 N.E.2d 802 (1980).

In misdemeanor cases, § 35A does not specify any remedy for the improper denial of a show cause hearing. In such cases a judge may not remand the complaint to the clerk-magistrate for a show cause hearing, but must dismiss the complaint, without prejudice to its being refiled and a show cause hearing scheduled on the new application. *Commonwealth v. DiBennadetto*, 436 Mass. 310, 313-314, 764 N.E.2d 338, 341-342 (2002); *Commonwealth v. Lyons*, 397 Mass. 644, 648, 492 N.E.2d 1142, 1145 (1986); *Commonwealth v. Tripolone*, 44 Mass. App. Ct. 23, 28 n.10, 686 N.E.2d 1325, 1329 n.10 (1997).

The exclusionary rule does not apply to evidence obtained because of a complaint and warrant issued in violation of § 35A, at least where the violation was negligent rather than intentional on the part of the police. *Commonwealth v. Lyons*, *supra*.

Improper denial of a show cause hearing is not grounds for overturning a conviction after trial. *Commonwealth v. Irick*, 58 Mass. App. Ct. 129, 131-133, 788 N.E.2d 573, 575-576 (2003); *Commonwealth v. Leger*, 52 Mass. App. Ct. 232, 752 N.E.2d 799 (2001).

See also Standards 4:00–4:02.

3:13 Criminal motor vehicle violations

A motorist who receives a motor vehicle citation that charges only misdemeanors is entitled, within four days of receiving the citation, to request a show cause hearing.

If one or more felonies are charged, the motorist may be given a show cause hearing in the magistrate's discretion if the police request or agree to such a hearing.

Whether or not a show cause hearing is held, the police must present the magistrate with sufficient facts, reduced to writing or recorded, to support each element of each offense charged. The citation alone is not sufficient to fulfill this requirement.

The motorist may raise as a defense to the issuance of a complaint the police officer's failure to give him or her a copy of the citation at the time and place of the violation, if none of the exceptions listed in G.L. c. 90C, § 2 applies. It appears that the magistrate has discretion whether to permit the motorist also to raise as a defense, except as to the offenses listed in G.L. c. 90C, § 2, the police department's failure to deliver a copy of the citation to the court within six business days. The magistrate has discretion whether to consider these defenses sua sponte.

Where the police do not issue a citation for a criminal motor vehicle violation, a private party may seek a criminal complaint for that offense.

Commentary

See G.L. c. 90C, §§ 2, 3(B)(2), and 4; G.L. c. 218, § 35A.

If a motorist receiving a citation for a misdemeanor motor vehicle violation fails to request a hearing in writing during the four-day period, the right to a hearing is deemed waived. G.L. c. 90C, § 3(B)(2); *Commonwealth v. Wade*, 372 Mass. 91, 360 N.E.2d 867 (1977).

See Standard 3:08 on show cause hearings for felonies.

Whether or not there is a hearing, the requirement of Mass. R. Crim. P. 3(g) that "the facts constituting the basis for the complaint . . . shall be either reduced to writing or recorded" may be satisfied by supplementing the citation with any combination of a police report, an electronic recording of the hearing, or oral testimony that is reduced to writing. The citation itself may "serve as the application for criminal complaint, supplemented if necessary with such additional information as shall be required by the administrative justice of the district court department." G.L. c. 90C, § (B)(2). However, the citation alone is not sufficient to satisfy Mass. R. Crim. P. 3(g) or Dist./Mun. Cts. R. Crim. P. 2(a), since it merely lists the offense(s) alleged and does not include the necessary facts to support the elements of each offense.

A failure to give the accused a citation at the time and place of the violation, if none of the statutory exceptions applies, is a defense that may be raised by the accused "in any court proceeding for such violation." G.L. c. 90C, § 2. The decisional law indicates that § 2 does not

require dismissal if the purposes of § 2 to provide the motorist with prompt and definite notice of the offense and to prevent manipulation of traffic tickets were not thwarted. *Commonwealth v. Pappas*, 384 Mass. 428, 425 N.E.2d 323 (1981). See, e.g., *Commonwealth v. Babb*, 389 Mass. 275, 450 N.E.2d 155 (1983) (delay in citing motorist excused where arrested for that offense on day of accident); *Commonwealth v. Kenney*, 55 Mass. App. Ct. 514, 772 N.E.2d 53 (2002) (delay in citing motorist excused because seriousness of offense would have put motorist on notice); *Commonwealth v. Barbuto*, 22 Mass. App. Ct. 941, 494 N.E.2d 33 (1986) (delay in citing motorist excused where further investigation necessary); *Commonwealth v. Mott*, 1988 Mass. App. Div. 157 (permissible to issue substitute citation later because original citation misinformed motorist about available options).

The police department must deposit the remaining copies of the citation with the clerk-magistrate of the court “not later than the end of the sixth business day after the date of the violation.” General Laws c. 90C, § 2 provides that “[f]ailure to comply with the provisions of this paragraph shall not constitute a defense to a complaint or indictment charging a violation of [G.L. c. 90, §§ 24, 24G or 24L] if such violation resulted in one or more deaths.” This appears to suggest that such failure may be raised as a defense to other offenses. Noncompliance with the 6-day deadline does not require dismissal if the notice and “no fix” purposes of § 2 were not frustrated. *Commonwealth v. Babb*, *supra* (serious charge virtually excludes manipulation and notice is implicit). See also *Commonwealth v. Drew*, 11 Mass. App. Ct. 517, 417 N.E.2d 53 (1981) (clerk’s not date stamping citations not grounds to conclude they were untimely).

Normally such defenses are raised by pretrial motion and must be raised by the accused or they are waived. However, it appears that the discretion granted by *Victory Distribs., Inc. v. Ayer Div. of Dist. Court Dep’t*, 435 Mass 136, 755 N.E.2d 273 (2001), is broad enough to permit a magistrate to consider either of these issues on request or sua sponte and, if the purposes of § 2 were violated, to decline to issue a complaint unless the District Attorney’s office wishes to prosecute.

A private complainant may seek a criminal complaint if the police fail to cite a motorist for a criminal motor vehicle violation. G.L. c. 90C, § 4. A private party may not do so, however, after the police have obtained a complaint which has been dismissed. *Commonwealth v. Steadward*, 43 Mass. App. Ct. 271, 273-276, 683 N.E.2d 683, 685-687 (1997). A private party may not charge a motorist with a civil motor vehicle infraction if the police decline to do so. *Soares v. Macedo*, 1987 Mass. App. Div. 80 (S. Dist.).

3:14 Scheduling show cause hearings; Cross-complaints; Witness summonses; Requests for continuance

Show cause hearings should be scheduled with reasonable promptness. The complainant should be given notice of and permitted to attend the hearing. Notice should be sent to the accused by regular mail on the standard form promulgated by the Administrative Office of the District Court. The accused should generally be given at least seven days notice. In exceptional cases, when a hearing is scheduled on short notice, the magistrate may request that the police serve the notice.

When a cross-complaint is filed by the accused against the initial complainant, a show cause hearing should not be automatically postponed until the initial matter has been adjudicated. If a magistrate decides to postpone consideration of the cross-complaint until the initial matter has been adjudicated, that decision should be based on the circumstances of the case and not solely on the order in which the complaints were filed.

Both the complainant and the accused may summons witnesses to testify at a show cause hearing. The clerk's office should provide blank summons forms at standard cost, unless waived, but need not issue or arrange for service of such summonses. On request, court staff should direct an inquirer to the statutory and rule provisions that govern the service of a witness summons.

If either party requests a continuance prior to the hearing date, the reason for the request should be determined and the request presented to a magistrate to determine. Continuances should be granted only upon a showing of good cause.

Commentary

Any decision by a magistrate to delay scheduling a show cause hearing on a cross-complaint brought by the accused until the initial matter has been adjudicated should be based on a consideration of the particular facts involved. The only appellate court to consider the issue has determined that it violates the Equal Protection Clause for a prosecutor to adopt a "first-come first-served" policy that imposes a blanket proscription against accepting a cross-complaint until the initial complaint has been prosecuted or dismissed, without regard to the facts of the particular case. *Myers v. County of Orange*, 157 F.3d 66 (2nd Cir. 1998), cert. denied, 525 U.S. 1146 (1999). *Myers* indicates that cross-complaints need not necessarily proceed simultaneously, but that any decision to postpone consideration of a cross-complaint must be based on an individualized determination rather than solely on the order in which they were filed. 157 F.3d at 75.

Compulsory process for witnesses is available for show cause hearings. Blank witness summonses may be obtained from a court clerk or a notary public. G.L. c. 233, § 1; Mass. R. Crim. P. 17(a). The cost of a blank summons obtained from a court clerk is set in the Uniform Schedule of Fees established by the Chief Justice for Administration and Management pursuant to G.L. c. 262, § 4B. A witness summons may be served by an officer authorized to serve criminal or civil process. G.L. c. 233, § 2; Mass. R. Crim. P. 17(d). The cost of a blank

summons and fees for its service are waivable as a “normal cost” under the Indigent Court Costs Law, G.L. c. 261, §§ 27A-29, and Mass. R. Crim. P. 17(b).

Requests for continuances made prior to the hearing date should normally be allowed, if there is good cause for the request. Requests for continuances should be determined by a magistrate.

On occasion, an accused may appear at the hearing and only then request a continuance in order to consult with counsel. The magistrate should respect the importance of the right to be assisted by counsel, while also considering any undue inconvenience to others involved in the hearing, particularly if they have incurred expenses or lost wages in attending. The magistrate may wish to bifurcate the hearing by hearing the complainant’s testimony that day, and permitting the accused an opportunity to be heard on a later date with counsel present.

While the accused must be afforded a reasonable opportunity to present defense testimony (including testimony by the accused), the accused has no right to cross-examine the complainant or other prosecution witnesses at a show cause hearing. *Commonwealth v. DiBennadetto*, 436 Mass. 310, 764 N.E.2d 338 (2002); *Commonwealth v. Riley*, 333 Mass. 414, 131 N.E.2d 171 (1956).

3:15 Public access to show cause hearings

Presumptively, show cause hearings are private and closed to the public. The complainant and the accused, and their counsel, have a right to attend. When an alleged victim is not the complainant, he or she should be permitted to attend unless subject to a witness sequestration order. A family member or friend of either party should generally be permitted to be in attendance for support unless subject to a sequestration order. Persons who cannot contribute materially to the proper hearing or disposition of the application should be excluded from a private hearing.

When there is a request that the public be permitted to attend, the magistrate should require that the person or organization making the request show a legitimate reason for access that justifies an exception to the rule. If the application is one of special public significance and the magistrate concludes that legitimate public interests outweigh the accused's right of privacy, the hearing may be opened to the public and should be conducted in the formal atmosphere of a courtroom.

When a request for an open hearing has been made, it is desirable that the magistrate make a brief written statement of the reasons for his or her decision on the request.

The same considerations and procedures should be applied when a judge redetermines an application for complaint. See Standards 2:05 and 3:22.

Commentary

The open and public character of most court proceedings is well known. However, there is no First Amendment or common law right of access to show cause hearings that precede the initiation of criminal proceedings. *Eagle-Tribune Pub. Co. v. Clerk-Magistrate of Lawrence Div. of Dist. Court Dep't*, 448 Mass. 647, 863 N.E.2d 517 (2007).

The legal considerations which dictate the public character of a trial are not present here. There is no tradition of public access to show cause hearings, which are similar to grand jury proceedings. Such secrecy protects individuals against whom complaints are denied from undeserved notoriety, embarrassment and disgrace. See *Matter of Doe Grand Jury Investigation*, 415 Mass. 727, 615 N.E.2d 567 (1993); *WBZ-TV4 v. District Attorney for Suffolk Dist.*, 408 Mass. 595, 599-600, 562 N.E.2d 817 (1990); *Jones v. Robbins*, 8 Gray 329, 344 (1857). This is particularly significant since there is no libel protection in civil law against accusations made in a criminal complaint application, no matter how scurrilous. *Sibley v. Holyoke Transcript-Telegram Pub. Co.*, 391 Mass. 468, 461 N.E.2d 823 (1984); *Thompson v. Globe Newspaper Co.*, 279 Mass. 176, 186-187, 181 N.E. 249, 253 (1932); *Kipp v. Kueker*, 7 Mass. App. Ct. 206, 211-212, 386 N.E.2d 1282, 1286 (1979). See also G.L. c. 218, § 31 (denied applications to be filed separately and destroyed one year after filing).

Since the accused is ordinarily entitled to privacy at this early stage, public hearings are the exception rather than the rule. The fact that the accused is well known or a public official is

not itself a sufficient reason to open a show cause hearing to the public. On the other hand:

“Where an incident has already attracted public attention prior to a show cause hearing, the interest in shielding the participants from publicity is necessarily diminished, while the public’s legitimate interest in access is correspondingly stronger.

“In deciding whether to allow access to a particular show cause hearing, clerk-magistrates should consider not only the potential drawbacks of public access, but its considerable benefits: ‘It is desirable that [judicial proceedings] should take place under the public eye’

“The transparency that open proceedings afford may be especially important if a well-publicized show cause hearing results in a decision not to bring criminal charges, thereby ending the matter. In such cases, the public may question whether justice has been done behind the closed doors of the hearing room. This is not to say that every case that may attract public attention necessarily requires a public show cause hearing”

Eagle-Tribune Pub. Co., 448 Mass. at 656-657, 863 N.E.2d at 527 (internal citations omitted). See also *George W. Prescott Pub. Co. v. Register of Probate for Norfolk County*, 395 Mass. 274, 277, 479 N.E.2d 658, 662 (1985) (strong public interest normally attends nonfrivolous accusations of misconduct in public office).

Since the exclusion of the public is for the benefit of the accused, if the accused wishes the hearing to be open to the public, normally it should be allowed.

When there is a request that the public be permitted to attend, the Supreme Judicial Court has encouraged magistrates to make a written record of the reasons for their decision on that request. *Eagle-Tribune Pub. Co.*, 448 Mass. at 657 n.17, 863 N.E.2d at 527 n.17.

Although their constitutionality is now in some doubt, statutes which bear on the right to a public trial may provide some guidance to a magistrate who is asked to conduct a public show cause hearing. See G.L. c. 278, §§ 16A (permitting closure of sex offense trial where victim is a minor); 16B (permitting closure of criminal trial involving husband and wife); 16C (permitting closure of trial for incest or rape); and § 16D (providing guidelines for insulating a child victim of sex offense from the public and defendant during his or her testimony).

In extraordinary cases, relief from a magistrate’s decision as to public access may be sought from a single justice of the Supreme Judicial Court under G.L. c. 211, § 3. *Eagle-Tribune Pub. Co.*, 448 Mass. at 657, 863 N.E.2d at 527.

When a show cause hearing is open to the public, members of the press too may attend. As to the use of cameras in a show cause hearing that is open to the public, see Supreme Judicial Court Rule 1:10.

See Standard 5:02 regarding public access to court records of applications for complaint.

3:16 Recording show cause hearings

Whether the hearing is private or public, there must be a written or electronically recorded record of the facts supporting the finding of probable cause for each offense for which a complaint is authorized.

It is good practice for all show cause hearings to be electronically recorded, subject to the availability of appropriate recording devices. If the hearing is not electronically recorded by the court, the accused is entitled, upon application, to make a private electronic recording. The accused is also entitled to employ a stenographer at his or her own expense.

If there is oral testimony that materially supplements or amends the complainant's earlier written statement, the substance of that testimony should be either reduced to writing or recorded.

Commentary

It is strongly recommended that a show cause hearing conducted by a magistrate be electronically recorded. If the court does not record the proceedings, the accused is entitled to do so upon application to the magistrate. District Court Special Rule 211(A)(1) and (B)(2). The accused is also entitled to employ a stenographer at his or her own expense. G.L. c. 221, § 91B.

Show cause hearings conducted by a judge must be electronically recorded. District Court Special Rule 211(A)(1).

Massachusetts R. Crim. P. 3(g) requires that a record be kept of the facts constituting the basis for the complaint as conveyed to the court by the complainant, either in writing or by electronic recording. Any written statements, any oral statements reduced to writing, and notations of the start and end index numbers of any electronic recording must be retained with the application.

For the retention requirements applicable to such records and recordings, see Standards 5:01 and 5:03.

3:17 Character of hearings; Role of counsel; Witnesses under oath; Interpreters; Right against self-incrimination

The magistrate should identify himself or herself and briefly explain the purpose and nature of the hearing.

Both the complainant and the accused may be represented by counsel.

All witnesses must be sworn or make an affirmation. A non-English speaker has the right to a court-provided qualified interpreter. Counsel may question opposing witnesses only in the magistrate's discretion. The magistrate may reasonably limit cumulative testimony.

The accused should be informed of the right against self-incrimination. The complainant and other witnesses may also be informed of the right against self-incrimination if there appears to be a danger that a witness may incriminate himself or herself.

It is desirable that a court officer be present at show cause hearings, when available.

Commentary

The magistrate should identify himself or herself at the outset of the hearing. The magistrate should also explain the limited nature of the hearing (to determine whether there is sufficient evidence to justify authorizing a criminal complaint) and the limited roles of the parties (e.g., that there is no right to cross-examination) to avoid confusion and promote a sense of fairness.

The complainant and the accused have the right to appear with their attorneys. See G.L. c. 218, § 35A (accused entitled “to be heard personally or by counsel in opposition” to complaint); c. 221, § 48 (parties “may manage, prosecute or defend their own suits personally, or by such attorneys as they may engage”). The law makes no provision for appointing counsel at public expense for the accused or a witness at a show cause hearing. Neither an accused nor an accused’s attorney has any right to examine or cross-examine participants directly. *Commonwealth v. Riley*, 333 Mass. 414, 131 N.E.2d 171 (1956). However, a magistrate has discretion to allow an attorney to ask questions or to suggest a line of questioning for the magistrate to pursue. Magistrates also retain discretion to limit the number of defense witnesses to avoid cumulative testimony. Unreasonable restrictions on the opportunity to present witnesses, however, can be tantamount to the denial of the statutory right to a hearing. *Commonwealth v. DiBennadetto*, 436 Mass. 310, 314, 764 N.E.2d 338, 342 (2002).

All witnesses should testify under oath or affirmation. The magistrate must “examine on oath the complainant and any witnesses produced by him” before the complaint is signed by the complainant. G.L. c. 276, § 22. “The preferred procedure would be to administer the oath before the complainant makes statements which could serve as the basis for the issuance of process.” *Commonwealth v. Cote*, 15 Mass. App. Ct. 229, 237, 444 N.E.2d 1282, 1288 (1983).

If the complainant, the accused or a witness cannot speak or understand English, they have the right to a court-provided qualified interpreter. G.L. c. 221C, § 2.

Often, accused persons, civilian complainants and witnesses are not represented by counsel at show cause hearings. If the hearing is to be recorded or reduced to written notes, these participants may be unaware that this record of the hearing could later be summonsed and introduced at trial as evidence of earlier admissions against interest or prior inconsistent statements. The Supreme Judicial Court has recommended to trial judges that “where a witness is ignorant, misinformed or confused about his rights” and there is a danger that the witness may incriminate himself or herself, it is “commendable practice” to inform the witness of the right against self-incrimination. *Taylor v. Commonwealth*, 369 Mass. 183, 192, 338 N.E.2d 823, 829 (1975). Similarly, it is “commendable practice” for a magistrate to inform accused persons and civilian complainants and witnesses of this Fifth Amendment right if there appears to be a danger that they may incriminate themselves. This must, of course, be done with care so that it does not appear intended to chill the accused’s right “to be heard personally or by counsel in opposition” to the complaint (G.L. c. 218, § 35A) or to threaten prosecution of witnesses who testify for the defense, see *Commonwealth v. Crawford*, 12 Mass. App. Ct. 776, 429 N.E.2d 54 (1981).

Opening remarks such as the sample on the next page are suggested to introduce the hearing and to inform the defendant of the right against self-incrimination.

SAMPLE OPENING REMARKS BEFORE A SHOW CAUSE HEARING

Good (morning) (afternoon). My name is _____. I am (the Clerk-Magistrate) (an Assistant Clerk-Magistrate) of this court and I will be conducting this hearing.

[*Complainant*] is seeking to bring criminal charges against [*Accused*]. The purpose of this hearing is to determine whether or not a criminal complaint should be issued, formally charging [*Accused*] with that criminal offense. It is not a trial to determine guilt or innocence; that will come later if a complaint is issued.

[Verify accused's name, address, date of birth, and social security number in a manner that respects the accused's privacy.]

[*Complainant*] alleges that on [*date*] [*Summarize application or police report, as appropriate*].

I will initially give [*Complainant*] an opportunity to testify and to present any witnesses or other evidence. If you have any documents or photographs, you must show them to the other side before I will consider them.

I may have some questions, and then I will give [*Accused*] an opportunity to ask questions, if you wish. You are under no obligation to ask any questions or to present any evidence and I would not hold that against you if you decide not to.

Once [*Complainant*] is done, I will hear from [*Accused*] as to whether or not a criminal complaint should be issued, and I will give you an opportunity to testify and to present any witnesses or other evidence. As I said before, you are under no obligation to present any evidence or to say anything here. Whether you say anything or not, the burden is on [*Complainant*] to show me that there is probable cause that a criminal offense was committed and that you committed it.

[*Accused,*] if you choose to speak today, you should understand that I may (record) (make notes of) these proceedings. So there is a possibility that something that you might say today might be used against you at a later time, either to show that you admitted something or that you testified differently today than at trial. If you are not sure whether you wish to speak today, I will give you a chance to speak to an attorney about your rights before you make your decision. But that would have to be at your own expense; I cannot appoint an attorney at public expense to represent you at this time. Do you understand what I have said?

You are not to interrupt each other during the course of the hearing. Each side will have a full and fair opportunity to present any relevant evidence that you want me to know. At the conclusion of all the evidence, I will make a decision based on the facts that I hear.

Do you have any questions about the course of the hearing?

Then will everyone who is going to testify in this matter, please raise your right hand. Do you solemnly swear or affirm that the evidence that you will give in the matter now in hearing will be the truth, so help you God?

[*Complainant,*] please tell me about your application.

SAMPLE ANNOUNCEMENT OF A FINDING

Based on the evidence presented here today, I find that there (is) (is not) sufficient evidence to establish probable cause to issue a criminal complaint.

If complaint issued: [*Accused,*] we will send you a summons at the address I confirmed with you earlier, requiring you to come back to this court for arraignment on [*Date*]. If you fail to appear on that date, the court will issue a warrant for your arrest. Do you understand that?

When the complainant is not a police officer, it is good practice to ask the complainant to remain until the complaint is prepared in order to sign it under oath.

If complaint denied: [*Accused,*] you are free to go.

3:18 Standard for authorizing a complaint: probable cause

The magistrate must decide if there is probable cause to believe that a crime has been committed and that the accused committed it.

The probable cause requirement is met when there is reasonably trustworthy information sufficient to warrant a prudent person in believing that a crime has been committed and that the accused is the perpetrator.

When there has been a show cause hearing, the probable cause determination should be made after the magistrate hears the complainant's full statement, the statements of any witnesses for the complainant, and, if the accused is present and wishes to testify before the magistrate, the full statement of the accused or the accused's counsel and any witnesses for the accused.

If the complainant's presentation does not demonstrate a prima facie case that a crime has been committed, the complaint may be denied without needing to hear from the accused.

Commentary

Probable cause standard. "The complainant need only present a statement of accusation which in the eyes of the magistrate is complete in terms of the elements of the crime and reasonably believable in terms of its allegations." *Commonwealth v. DiBennadetto*, 436 Mass. 310, 314, 764 N.E.2d 338, 342 (2002), quoting the 1975 version of these Standards.

"Probable cause exists where . . . the facts and circumstances within the knowledge of the [magistrate] are enough to warrant a prudent person in believing that the individual . . . has committed . . . an offense . . . Probable cause is a relatively low threshold, requiring only sufficiently trustworthy information to instill in a reasonable person the requisite belief of criminality." *Paquette v. Commonwealth*, 440 Mass. 121, 132, 795 N.E.2d 521, 531-532 (2003). This is the same probable cause standard that the police must apply in making an arrest, and it "is lower than that for submitting a criminal case to a jury (facts warranting a finding of guilt beyond a reasonable doubt)" at trial. *Commonwealth v. Lent*, 420 Mass. 764, 765 n.2, 652 N.E.2d 140, 140 n.2 (1995). This standard is also lower than the probable cause standard that is applied by a judge in a bind-over hearing. *Paquette, supra; Commonwealth v. McCarthy*, 385 Mass. 160, 430 N.E.2d 1195 (1982); *Myers v. Commonwealth*, 363 Mass. 843, 850, 298 N.E.2d 819, 823-824 (1973).

If there is any uncertainty about the elements of a particular offense, the magistrate should consult the text of the statute and standard reference works such as the District Court's Complaint Language Manual, the District Court's Model Jury Instructions for Use in the District Court, the Judicial Institute's A Quick Reference to the Elements of Crimes, J.R. Nolan & L.J. Sartorio, Criminal Law (3d ed.), or R.G. Stearns, Massachusetts Criminal Law: A Prosecutor's Guide.

When the accused does not appear. The accused person is not required to appear, since a show cause hearing is an optional “opportunity to be heard personally or by counsel in opposition to the issuance of any process” (G.L. c. 218, § 35A). Massachusetts R. Crim. P. 3(g) provides that the magistrate “shall not authorize a complaint unless the information presented by the complainant establishes probable cause.” Even when the accused fails to appear at the show cause hearing, the complainant must establish probable cause before the magistrate may authorize a complaint.

When the accused or counsel appears in opposition. Since the magistrate’s task is not to sit as factfinder but to determine probable cause, the magistrate should avoid a simple weighing of the complainant’s charges against the accused’s defenses. The magistrate should first consider whether the complainant’s statement, taken on its own, provides reason to believe that the accused committed the offense charged.

If the magistrate finds that the complainant has established probable cause, it is not enough for the accused to contradict or even cast some doubt on the complainant’s statements. Rather, to avoid the complaint, the accused must completely refute the complainant’s evidence of probable cause.

This can generally be done in two ways. First, the accused can offer a legal defense based on uncontroverted facts – e.g., that an identical charge has already been brought and resulted in an acquittal or dismissal with prejudice. Unless such a defense is unquestionable, it is better left for the trial judge and not used as the basis for denying a complaint.

Secondly, the accused can present a factual defense that completely discredits the complainant’s story or vitiates the complainant’s credibility. An example would be a persuasive alibi which makes the complainant’s identification of the accused as the perpetrator no longer credible.

In making such determinations, it is not appropriate for the magistrate simply to balance competing testimony. The magistrate does not sit as a fact finder, but simply to determine whether there is probable cause to present the allegations to a fact finder. Resolution of factual disputes is a matter for trial. If the complainant has presented a prima facie case, the accused’s evidence should result in denial of the complaint for lack of probable cause only if the accused completely discredits the complainant’s credibility or establishes a defense based on uncontradicted facts.

3:19 Decision of the magistrate

An application should be acted upon promptly unless withdrawn, deferred for necessary investigation, or deferred with the consent of the parties.

When action on an application is deferred with the consent of the parties, if the magistrate has determined that there is probable cause for the complaint, the application should be so marked.

Commentary

Determination of the application should be deferred only with the consent of the complainant and the accused, or when further investigation is necessary. (See Standard 3:06.)

The magistrate may suggest an informal resolution that includes deferring decision on the application for a period of time (e.g., six months or a year), conditioned upon the complainant resolving the matter or avoiding any repetition of the conduct. Such a deferral requires the consent of the complainant. *Commonwealth v. Clerk of Boston Div. of the Juvenile Court Dep't*, 432 Mass. 693, 703, 738 N.E.2d 1124, 1131 (2000). It should also be undertaken only with the consent of the accused, who is entitled to a reasonably prompt determination of the charges against him or her. Due process suggests that any obligations imposed on the accused as a condition of such deferral must be set out with sufficient definiteness so that the accused can understand what conduct is required or prohibited.

Such a deferral may be conditioned on payment of reasonable restitution if there is probable cause for the complaint and the amount is limited to the complainant's actual economic loss caused by the accused. However, the magistrate should not suggest or approve any payment that is a penalty or a monetary windfall, since such "[p]rivate payments exchanged for releases from criminal responsibility erode, if not completely erase, the demarcation between the criminal and civil systems of justice [and] create the perception that a class-based criminal justice system exists and that those with resources may buy their way out of criminal liability." *Commonwealth v. Rotonda*, 434 Mass. 211, 220-222, 747 N.E.2d 1199, 1206-1208 (2001); *Commonwealth v. Nawn*, 394 Mass. 1, 474 N.E.2d 545 (1985).

The magistrate must also be wary not to permit the criminal process to be used by the complainant solely to obtain a civil advantage. See S.J.C. Rule 3:09, Mass. R. Prof. C. 3.4(h) (attorney may not present criminal charges solely to obtain an advantage in a private civil matter); G.L. c. 268, § 36 (compounding a felony consists in taking money upon an understanding not to prosecute a felony); *Partridge v. Hood*, 120 Mass. 403 (1876) (discussing related common law offense of compounding a misdemeanor). General Laws c.276, § 55 does not authorize a formal accord and satisfaction agreement to be filed until after a complaint has been authorized.

A magistrate should not suggest a voluntary contribution to a charity as a condition of resolving an application for complaint. While this may be viewed as a benign form of community restitution as part of the informal disposition of a minor matter, it may also appear as

the use of public authority in an inherently coercive situation to extract an unauthorized financial penalty for the benefit of the charity.

A magistrate should not suggest a voluntary blood donation as a condition of resolving an application for complaint. The American Red Cross and related organizations do not accept blood donations from accused persons in such circumstances.

3:20 Withdrawal of the application

When a complainant withdraws an application for complaint, the withdrawal should be noted on the application. If notice of the application has been sent to the accused, the accused should be informed by the court of such withdrawal.

Commentary

A note should be made on the application that it was withdrawn at the request of the complainant, and the parties so notified.

3:21 Denial of the application

When an application for complaint is denied after a show cause hearing, both the complainant and the accused should be so informed, either orally at the hearing or later in writing.

When an application for complaint is denied ex parte without a show cause hearing being scheduled, normally it is appropriate to so inform the accused as well as the complainant. This need not be done if a formal application was never filed or was later withdrawn or abandoned, or if there is other good reason for not notifying the accused.

Commentary

Both the complainant and the accused should be informed of the denial of the application after a show cause hearing. If the magistrate did not announce the decision at the hearing, an appropriate notice should be mailed to the parties.

When an application is denied ex parte, the denial should be communicated to the complainant orally or by a written notice. Usually it is desirable that the accused also be informed by means of a written notice that a criminal complaint has been sought and denied against him or her. It is not necessary to inform the accused if the complainant consulted the clerk's office but never filed a formal application for complaint, or later withdrew or abandoned the application. It may not be appropriate to notify the accused of the denial if the complainant is a law enforcement officer who is undertaking further investigation, or if the magistrate concludes that there is other good reason for not notifying the accused.

3:22 Redetermination by a judge after a magistrate's denial

If the magistrate *authorizes* a complaint, the accused may not appeal the magistrate's determination or have it redetermined by a judge. At or after the arraignment the accused may file a motion to dismiss the complaint.

If the magistrate *denies* a complaint, the complainant may not appeal the magistrate's determination, but may request a judge to redetermine the matter. If a complainant manifests serious dissatisfaction with the magistrate's denial of a complaint, the magistrate should inform the complainant that a judge has discretion whether or not to redetermine the matter. If such a redetermination is requested, the magistrate should provide the judge with the application and any supporting materials so that the judge may promptly decide the request.

The judge has discretion to consider the application *de novo*, or merely to review the factual allegations previously provided to the magistrate, or to deny redetermination. The judge may limit any redetermination to the information previously provided to the magistrate or may allow additional evidence or argument from the parties or counsel. If the judge hears evidence or argument, the judge should afford the accused an opportunity to be heard if required by G.L. c. 218, § 35A or if the magistrate heard from both parties.

Commentary

If a magistrate *authorizes* a complaint, that decision may not be appealed to or redetermined by a judge. The defendant's remedy is to file a motion to dismiss at or after the arraignment. *Commonwealth v. DiBennadetto*, 436 Mass. 310, 313-314, 764 N.E.2d 338, 341-342 (2002). (See Standard 4:00.)

While there is no right of appeal if a magistrate *denies* a complaint, the complainant may reapply to a judge, who may consider the application in his or her discretion. Under G.L. c. 218, §§ 32 & 35, and G.L. c. 276, § 22, judges have coextensive authority with magistrates to authorize criminal complaints. Judges also have inherent authority to redetermine applications for criminal complaints that have been denied by a magistrate. *Bradford v. Knights*, 427 Mass. 748, 752, 695 N.E.2d 1068, 1071 (1980).

Whether to do so is a matter of judicial discretion. Since a magistrate's decision is not appealable as of right, in order to insure public confidence a judge should consider allowing a redetermination when the complainant provides a reasonable basis for challenging the magistrate's decision. A new hearing need not follow every denial of process. A judge might require a dissatisfied complainant to explain in writing why a redetermination should be made before deciding whether to grant the request.

A judge who authorizes a criminal complaint is disqualified from later presiding over the trial of that complaint if the defendant objects before any evidence is taken. G.L. c. 218, § 35.

3:23 Completing the complaint

When an application for complaint is granted, the magistrate should mark the application to indicate on which offenses probable cause was found. The magistrate should also note whether the finding was based on facts set forth in attached statements or reports or upon recorded oral testimony.

The complaint should then be processed using the standard complaint language from the District Court’s Complaint Language Manual, unless the District Attorney’s office requests the clerk’s office to vary that language.

If there is no standard complaint language for the offense charged, the magistrate should prepare appropriate charging language, following as closely as possible the wording of the statute, ordinance or by-law, and taking care to include all the elements of the offense(s) charged. The magistrate may seek assistance in drafting charging language from the District Attorney’s office, since the charging language is ultimately the responsibility of the Executive Branch, or from the Administrative Office of the District Court.

Commentary

Longstanding Massachusetts practice is for criminal complaints to be prepared by court personnel. See G.L. c. 276, § 22 (“Upon complaint made to any justice that a crime has been committed, he shall . . . reduce the complaint to writing, and cause it to be subscribed by the complainant”). Although the charging language in the District Court’s Complaint Language Manual is normally utilized as a matter of course, it is the prosecutor’s right to vary the charging language as he or she chooses. Under the constitutional separation of powers, the choice of charging language is ultimately the responsibility of the District Attorney’s office since the prosecution decision lies ultimately with the Executive Branch “and that discretion is exclusive to them.” *Commonwealth v. Cheney*, 440 Mass. 568, 574, 800 N.E.2d 309, 314 (2003). See *Victory Distribs., Inc. v. Ayer Div. of Dist. Court Dep’t*, 435 Mass 136, 143, 755 N.E.2d 273, 279 (2001) (“The discretion of judges and clerk-magistrates to decide whether to issue complaints is ancillary to the discretion of prosecuting authorities to decide whether to prosecute a particular case”); *Commonwealth v. Taylor*, 428 Mass. 623, 629, 704 N.E.2d 170, 173 (1999) (Under art. 30 of Mass. Declaration of Rights, “a prosecutor’s wide discretion in deciding whether to prosecute a particular defendant . . . is exclusive to the executive branch”); *Baglioni v. Chief of Police*, 421 Mass. 229, 232, 656 N.E.2d 1223, 1225 (1995) (prosecutor “has unfettered authority concerning the withdrawal of charges [and] without judicial approval, a prosecutor may make charge concessions to a defendant”).

While Massachusetts law requires that an accused person be apprised of the charges against him or her, a complaint need not include specific facts that are not essential elements of the offense and can be obtained by a bill of particulars. G.L. c. 277, § 34, made applicable to complaints by G.L. c. 277, § 79.

A complaint must allege every element (whether defined by statute or case law) necessary to constitute the offense. *Commonwealth v. Palladino*, 358 Mass. 28, 30, 260 N.E.2d

653, 654-656 (1970); *Commonwealth v. Hawkins*, 21 Mass. App. Ct. 766, 767, 490 N.E.2d 489, 490 (1986). An offense may be alleged by using the statutory wording or other words conveying the same meaning. G.L. c. 277, § 17. It is not necessary to cite the statute, ordinance, by-law, rule or regulation that was violated. G.L. c. 277, § 33; *Commonwealth v. Munoz*, 11 Mass. App. Ct. 30, 32, 413 N.E.2d 773, 775 (1980). The text of the complaint and not the statutory citation determines the crime being charged. *Commonwealth v. Lovett*, 374 Mass. 394, 399, 372 N.E.2d 782, 786 (1978). Enhanced punishment that is authorized only for a subsequent offense may be imposed only if the prior offense(s) have been alleged in the complaint. *Commonwealth v. Fortier*, 258 Mass. 98, 100, 155 N.E. 8, 9 (1927); *Commonwealth v. Harrington*, 130 Mass. 35, 36 (1880).

3:24 Signing the complaint

The complaint must be signed under oath or affirmation by the complainant. The jurat recording that oath should be signed by a magistrate or by a deputy assistant clerk.

Commentary

As noted in Standard 1:01, the complainant need not be an eyewitness to nor have first-hand knowledge of the offense charged. However, G.L. c. 276, § 22 requires that the complaint must be signed by the same person who is examined on oath. This requirement is strictly construed. See *Commonwealth v. Barhight*, 75 Mass. (9 Gray) 113 (1857) (complaint must be subscribed by complainant so as to verify all essential parts). It is improper for the complainant to sign a blank complaint form which is to be filled in later. *Commonwealth v. Hanley*, 12 Mass. App. Ct. 501, 504, 426 N.E.2d 731, 733 (1981).

The signature of the magistrate or deputy assistant clerk is simply a jurat, i.e., a certification that the complainant took the oath or affirmation to the complaint.

3:25 Selection of process: summons or warrant

The magistrate should order a summons to issue unless there is reason to believe that the accused will not appear. In that case a warrant should issue.

Neither the complainant nor the accused may appeal to a judge the magistrate's choice between a summons and a warrant.

Commentary

General Laws c. 276, § 24 and Mass. R. Crim. P. 6(a) direct the magistrate to issue a summons unless there is reason to believe the accused will not appear on a summons. But cf. G.L. c. 265, § 13A (in assault or assault and battery case, summons “may be issued” instead of warrant where there is reason to believe that accused will appear on summons).

Since the underlying consideration in selecting the appropriate process is similar to that in setting bail, namely whether the accused, if given his or her liberty while awaiting trial, will appear of his or her own volition, the factors used for the setting of bail may offer some appropriate guidance in determining whether a summons or warrant should issue. See G.L. c. 276, § 58.

“There is, however, one significant difference between the decision made concerning the issuance of a summons and that concerning the appropriate conditions of release after arrest. When a decision on bail is made, the court or magistrate has more information concerning the defendant than when a summons or warrant is to be issued In light of these considerations, it is intended that the court not be prohibited from issuing an arrest warrant where there is an absence of sufficient information to make an intelligent choice concerning the appropriate process to be issued. Where there is a dearth of information concerning the defendant, it is expected that the court will place much reliance upon the nature of the offense charged and will order the arrest of defendants charged with serious crimes. An arrest in such situations will not unduly prejudice a defendant, because, if he is suitable for pretrial release on his own recognizance, the court can so order when the defendant is initially brought before it after arrest.”

Reporter's Notes to Mass. R. Crim. P. 6.

A summons must be served at least 24 hours before the return date. G.L. c. 276, § 25.

An arrest warrant may be issued either electronically (“The warrant shall consist of sufficient information electronically appearing in the warrant management system,” G.L. c. 276, § 23A) or in writing. A purported oral “arrest warrant” is invalid. *Commonwealth v. Fredette*, 396 Mass. 455, 457-458, 486 N.E.2d 1112, 1115 (1985).

3:26 Prosecution of private complaints

The court should maintain close administrative liaison with the District Attorney's office and the police to insure the timely prosecution of complaints brought by private complainants.

Commentary

Care should be taken to insure that prosecutors and police are properly informed of complaints brought by private complainants so that they may be prosecuted by the District Attorney's office in the ordinary course. See G.L. c. 218, § 27A(g) (district attorney shall appear for Commonwealth in District Court jury cases and may appear in any other); *Burlington v. District Attorney for Northern Dist.*, 381 Mass. 717, 719-720, 412 N.E.2d 331, 333 (1980) (attorney general or district attorney may appear for Commonwealth in any District Court criminal case); LaFave, Israel, King & Kerr, 4 *Criminal Procedure* § 13.3(b) (3d ed. 2007) (general view is that private prosecutions are constitutionally permissible only if prosecutor maintains substantial control over case).

**CHALLENGING THE ISSUANCE OF A COMPLAINT
BY A MOTION TO DISMISS
(Standards 4:00 - 4:02)**

4:00 Motion to dismiss the complaint

An accused may challenge the magistrate’s issuance of a complaint only by a motion to dismiss. An accused may not challenge the magistrate’s issuance of a complaint by requesting a judge to review or redetermine the magistrate’s decision or to remand the matter to the magistrate.

A motion to dismiss the complaint may be based on a claim that the evidence before the magistrate did not support a finding of probable cause.

A motion to dismiss the complaint may also be based on a claim that there was a defect in the procedure utilized by the magistrate. This may include a claim that the accused was denied his or her statutory right to a show cause hearing

Motions to dismiss a complaint must be timely filed prior to trial and must comply with the requirements of Mass. R. Crim. P. 13, including an affidavit on personal knowledge and a memorandum of law.

A judge may allow or deny a motion to dismiss the complaint but may not remand the complaint to the magistrate.

Commentary

As noted in Standard 3:22, when a magistrate has authorized a complaint after a show cause hearing, the accused may not request a redetermination of that decision by a judge.

A motion to dismiss the complaint after its issuance is “the appropriate and only way” to assert that there was insufficient evidence before the magistrate to constitute probable cause or to challenge an alleged “defect in the procedure before the clerk-magistrate (whether failure to permit testimony of a defense witness, interference with the proceeding by an unauthorized participant or other challenge).” It is also the remedy for “a violation of the integrity of the proceeding, see *Commonwealth v. O’Dell*, 392 Mass. 445 (1984) [where exculpatory evidence was withheld by the prosecution], or for any other challenge to the validity of the complaint.” *Commonwealth v. DiBennadetto*, 436 Mass. 310, 313, 764 N.E.2d 338, 341 (2002); *Bradford v. Knights*, 427 Mass. 748, 753, 695 N.E.2d 1068, 1072 (1998).

Since September 7, 2004, Mass. R. Crim. P. 3(g) requires that any criminal complaint be based on a magistrate’s or judge’s finding of probable cause and also that “the facts constituting the basis for the complaint . . . be either reduced to writing or recorded.” Defendants may seek to dismiss the complaint if the record shows that the magistrate lacked probable cause to authorize the complaint or that the magistrate failed to comply with the rule’s directive to

preserve an adequate record of the facts underlying the probable cause finding. See *DiBennadetto, supra*; Reporter's Notes to Mass. R. Crim. P. 3(g) (noting that "the consequences, if any, of the failure of the record in a particular case to demonstrate probable cause is a matter that the rule does not address" but quoting *DiBennadetto* that "the defendant's remedy is a motion to dismiss").

As noted in Standard 3:12, a defendant may also seek dismissal if the magistrate authorized a misdemeanor complaint without affording the defendant an opportunity to be heard at a show cause hearing if the defendant was not arrested and none of the exceptions in G.L. c. 218, § 35A applied.

Motions to dismiss must be in writing, state "with particularity" the grounds relied on, be accompanied by an affidavit made on personal knowledge and a memorandum of law, and be timely filed within 21 days of the assignment of a trial date. Mass. R. Crim. P. 13(a) & (d)(2).

Challenges to the authorization of the complaint are waived unless timely raised in a pretrial motion to dismiss. Mass. R. Crim. P. 13(c)(1). See *Commonwealth v. Beneficial Fin. Co.*, 360 Mass. 188, 229, 275 N.E.2d 33, 58 (1971), cert. denied sub nom. *Farrell v. Massachusetts*, 407 U.S. 910, and sub nom. *Beneficial Fin. Co. v. Massachusetts*, 407 U.S. 914 (1972) (attempted midtrial challenge to sufficiency of evidence before grand jury came too late). Nor is erroneous denial of a show cause hearing grounds for overturning a conviction after trial. *Commonwealth v. Irick*, 58 Mass. App. Ct. 129, 131-133, 788 N.E.2d 573, 575-576 (2003) (erroneous denial of pretrial motion to dismiss was harmless error where there was probable cause for complaint); *Commonwealth v. Leger*, 52 Mass. App. Ct. 232, 241-242, 752 N.E.2d 799, 807 (2001) (lack of show cause hearing cannot be raised for first time on appeal).

4:01 Hearing on a motion to dismiss

If a motion to dismiss alleges that the magistrate lacked probable cause to authorize the complaint, the judge's review is limited to determining whether there was probable cause for each of the essential elements and the identification of the defendant as the perpetrator. The credibility of the witnesses and the weight of the evidence are matters beyond the scope of the judge's review.

A judge may hold an evidentiary hearing if a motion to dismiss alleges a defect in the procedure utilized by the magistrate (such as a failure to afford the defendant a show cause hearing), or serious misconduct by the complainant undermining the fairness of the process.

As the moving party, the defendant has the burden of proof on a motion to dismiss.

Commentary

The burden of proof on a motion to dismiss the complaint is on the defendant, as the moving party. See *Commonwealth v. Benjamin*, 358 Mass. 672, 676 n.5, 266 N.E.2d 662, 665 n.5 (1971) (motion to dismiss indictment); *Commonwealth v. Pond*, 24 Mass. App. Ct. 546, 551, 510 N.E.2d 783, 786 (1987) (same).

Motion to dismiss for want of probable cause. The *DiBennadetto* decision did not specifically discuss the standard to be applied by the reviewing judge, but cited *Commonwealth v. McCarthy*, 385 Mass. 160, 430 N.E.2d 1195 (1982), and *Commonwealth v. O'Dell*, 392 Mass. 445, 466 N.E.2d 828 (1984). These were landmark cases discussing the scope of a judge's review of grand jury decisions. They reaffirmed the traditional rule that "a court will not inquire into the competency or sufficiency of the evidence before the grand jury" except to decide a claim that the evidence did not rise to the level of probable cause for an arrest (sufficient evidence to establish probable cause that a crime was committed and the identity of the accused as the perpetrator), or a claim that evidence was partially withheld in a way that misrepresented its significance. See also *Commonwealth v. Caracciola*, 409 Mass. 648, 650, 569 N.E.2d 774, 776 (1991); *Commonwealth v. Freeman*, 407 Mass. 279, 282, 552 N.E.2d 553, 555 (1990). Normally this will not involve passing judgment on the veracity of the witnesses. *Commonwealth v. Champagne*, 399 Mass. 80, 83 n.4, 503 N.E.2d 7, 10 n.4 (1987). This standard of probable cause to arrest "is considerably less exacting than a requirement of sufficient evidence to warrant a guilty finding . . . to overcome a motion for a required finding of not guilty at a trial." *Commonwealth v. O'Dell*, 392 Mass. at 450-451, 466 N.E.2d at 830-832.

Motion to dismiss for failure to afford a show cause hearing. The defendant must first present evidence by way of affidavit that the complaint was issued without an opportunity for a show cause hearing as required by G.L. c. 218, § 35A, that none of the statutory exceptions to that requirement applied, and that the defendant was not under arrest for that offense. If the motion is allowed, the complaint is to be dismissed without prejudice to its being refiled and a show cause hearing scheduled. *DiBennadetto, supra*; *Commonwealth v. Lyons*, 397 Mass. 644,

648, 492 N.E.2d 1142, 1145 (1986); *Commonwealth v. Irick*, 58 Mass. App. Ct. 129, 132-133, 788 N.E.2d 573, 576 (2003); *Commonwealth v. Tripolone*, 44 Mass. App. Ct. 23, 28 n.10, 686 N.E.2d 1325, 1329 n.10 (1997). See also Standard 3:12.

Motion to dismiss for failure to allow defendant to present evidence. While the magistrate may limit the number of witnesses to prevent cumulative or irrelevant testimony, and the accused has no right to cross-examine witnesses at a show cause hearing, “[u]nreasonable restrictions on the opportunity to present witnesses can be tantamount to the denial of the right of a hearing.” *DiBennadetto*, 436 Mass. at 314-315, 764 N.E.2d at 342. Where there was sufficient evidence to support the magistrate’s finding of probable cause, exclusion of evidence that merely contradicts the complainant’s testimony would not warrant dismissal unless the excluded evidence would have undercut that testimony. See *Commonwealth v. Irick*, 58 Mass. App. Ct. 129, 132, 788 N.E.2d 573, 576 (2003).

Motion to dismiss for violation of the integrity of the show cause proceeding. The *DiBennadetto* decision held that “a motion to dismiss will lie for a . . . violation of the integrity of the proceeding.” *DiBennadetto*, 436 Mass. at 314-315, 764 N.E.2d at 342. The Court made reference to *Commonwealth v. O’Dell*, 392 Mass. 445, 447, 466 N.E.2d 828, 829 (1984), in which significant exculpatory evidence was withheld from a grand jury and dismissal was held to be proper if withholding the exculpatory evidence “seriously tainted the presentation.” Where an indictment is claimed to rest on false evidence being presented to the grand jury, the defendant has “a heavy burden” of proving that “(1) the evidence was given to the grand jury knowingly or with reckless disregard for the truth and for the purpose of obtaining an indictment, and (2) that the evidence probably influenced the grand jury’s determination to indict the defendant. Inaccurate testimony given in good faith does not by itself require dismissal.” *Commonwealth v. Kelcourse*, 404 Mass. 466, 468, 535 N.E.2d 1272, 1273 (1989) (citation omitted); *Commonwealth v. Mayfield*, 398 Mass. 615, 619-622, 500 N.E.2d 774, 777-779 (1986). Although these cases involved testimony by a police officer or prosecutor, similar conduct by a private complainant (particularly if it meets the elements of the tort of malicious prosecution) might also warrant dismissal.

4:02 Effect of allowance of a motion to dismiss; Reapplication

Dismissal must ordinarily be without prejudice. After a dismissal without prejudice, the prosecution may either file a motion to reconsider, file a new application for complaint in the same court, appeal from the dismissal of the original complaint, or seek an indictment from the grand jury.

Commentary

If the Commonwealth disagrees with the judge's dismissal of a complaint without prejudice, it may either file a motion to reconsider, seek a new complaint in the same court, file a notice of appeal, or seek an indictment. *Commonwealth v. Heiser*, 56 Mass. App. Ct. 917, 778 N.E.2d 973 (2002). The judge cannot compel the Commonwealth to proceed by indictment except after conducting a probable cause hearing and making an unambiguous declination of jurisdiction. *Id.*, 56 Mass. App. Ct. at 918, 778 N.E.2d at 975. The judge has inherent authority, on a motion for reconsideration, to reinstate a complaint that was dismissed without prejudice. *Commonwealth v. Aldrich*, 21 Mass. App. Ct. 221, 226-228, 486 N.E.2d 732, 736-737 (1985).

If the complaint was properly dismissed for lack of probable cause, a new application must be supported by additional evidence not presented at the original hearing.

Dismissal with prejudice is permissible only where there has been "willfully deceptive or otherwise egregious" misconduct by the prosecution, such as intentional withholding of exculpatory evidence, or "at least a serious threat of prejudice" to the defendant. *Commonwealth v. Ortiz*, 425 Mass. 1011, 681 N.E.2d 272 (1997); *Commonwealth v. Connelly*, 418 Mass. 37, 38, 634 N.E.2d 103, 104; *Commonwealth v. O'Dell*, 392 Mass. 445, 450-452, 466 N.E.2d 828, 829 (1982). If the complaint is dismissed with prejudice, the Commonwealth may not refile the complaint, but must instead either seek reconsideration of or appeal the dismissal. *Commonwealth v. Monahan*, 414 Mass. 1001, 607 N.E.2d 407 (1993).

COMPLAINT RECORDS AND PUBLIC ACCESS (Standards 5:00 - 5:05)

5:00 General rule regarding public access

Based on common law and constitutional grounds, criminal complaints and most other court records are presumptively open to the public even though the Commonwealth's general public access statutes do not apply to court records.

Commentary

For a comprehensive view of this issue, see the current version of *A Guide to Public Access, Sealing & Expungement of District Court Records* published by the Administrative Office of the District Court (which is available on the District Court's internet website at www.mass.gov/courts/courtsandjudges/courts/districtcourt/pubaccesscourtrecords.pdf) and the *Guidelines on the Public's Right of Access to Judicial Proceedings and Records* (March, 2000) developed by the Supreme Judicial Court's Judiciary/Media Steering Committee (available at www.mass.gov/courts/sjc/docs/pubaccess.pdf).

5:01 Applications for complaints: record requirements

A standard application for complaint form and statement of facts must be filed for each complaint sought.

The magistrate making the probable cause determination must insure there is a record of the facts presented. The record may consist of any combination of written statements and written notes or electronic recordings of oral testimony. Such records should be attached to the application form.

In the case of an electronic recording, the magistrate should note on the application form the necessary retrieval information for the recording. (For a digital recording, this is the date and the start and end times. For a tape recording, this is the tape or cassette number and the start and end index numbers.)

If a complaint is authorized, the application form and any attachments must be filed in the criminal case file.

If a complaint is denied, the application form and any attachments must be kept separate from any criminal records and destroyed after one year.

If a show cause hearing was electronically recorded, the recording must be preserved for one year. When an electronic recording is the only record of facts establishing probable cause for a criminal complaint, the recording should be retained for 2½ years, unless the case is disposed earlier.

Commentary

General Laws c. 218, § 35 directs the clerk-magistrate to file a denied application for complaint separately from any criminal complaints and to “destroy such application one year after the date such application was filed, unless a justice of such court or the chief justice of the district courts shall for good cause order that such application be retained on file for a further period of time.” (The statute provides that this does not apply to applications for complaint for multiple unpaid parking tickets under G.L. c. 90, § 20C .)

District Court Special Rule 211(A)(4) requires that electronic recordings of a magistrate’s show cause hearing be preserved for one year, and the recordings of a judge’s show cause hearing for 2½ years. If the recording of a magistrate’s hearing provides the only record of the facts establishing probable cause, as required by Mass. R. Crim. P. 3(g), it should be preserved for 2½ years, unless the case is disposed earlier, since it may be relevant in determining a motion to dismiss the complaint during the ensuing criminal case. See also Standard 3:16.

5:02 Applications for complaints: public access

A criminal proceeding does not commence in the District Court until a complaint has been authorized. An application for complaint is merely a preliminary procedure to determine if criminal proceedings should commence.

If an application for complaint has been filed but no determination has yet been made, it is merely an accusation as to which no judicial officer has yet found probable cause. Public dissemination of inaccurate information in such an application could unfairly stain the reputation of the accused. Pending applications, therefore, are presumptively unavailable to the public unless a magistrate or judge concludes that the legitimate interest of the public outweighs any privacy interests of the accused.

Denied applications, and any electronic record of the show cause hearing, are also unavailable to the public unless a magistrate or judge makes a determination that the legitimate interest of the public outweighs any privacy interests of the accused.

When a request for such access is made, the appropriate considerations are similar to those in determining whether to permit the public to attend a show cause hearing. See Standard 3:15.

When a complaint has been denied, because of the accused's privacy interests, the complainant should be permitted to obtain a copy of any electronic record of the show cause hearing only for a legitimate purpose, including related civil litigation.

After a complaint is issued, the application, together with any record of the facts presented to the magistrate, including any recordings, becomes part of the criminal case file and is publicly available unless impounded by a judge.

The accused has the right to view and obtain a copy of any application and supporting documents filed against him or her and a recording of any testimony recorded at a show cause hearing.

Commentary

District Court criminal proceedings do not commence until a complaint is authorized. See Mass. R. Crim. P. 3(a).

There is no First Amendment or common law right of access to proceedings to determine whether to authorize or deny a criminal complaint, and historically such proceedings have not been open to the public. *Eagle-Tribune Pub. Co. v. Clerk-Magistrate of Lawrence Div. of Dist. Court Dep't*, 448 Mass. 647, 863 N.E.2d 517 (2007). Therefore the general requirements regarding public access to criminal court records and proceedings do not apply to applications for complaint.

The withholding of pending and denied applications is for the benefit of the accused.

The accused is entitled to access to such records, and if the accused wishes to permit public access to such records, normally it should be allowed.

If an application is made for a complaint after an arrest and the magistrate declines to authorize a complaint for lack of probable cause, public access to the application should be handled in the same manner as other denied applications. See Standard 2:04.

5:03 Criminal case files: record requirements

A criminal case file consists of the docket sheet, the complaint signed by the named complainant, the application for complaint and attached papers, appearances of counsel, motions and other papers filed by the parties, decisions or orders by a judge, and often copies of forms required by statute or court rule. It may also include documentary exhibits introduced into evidence if they were retained in the court's custody and transcripts or appellate decisions if the case was appealed.

By statute, the clerk-magistrate has the care and custody of the court's records and must keep a record of all its proceedings. G.L. c. 218, § 12. Criminal case files should be complete and stored in a systematic manner that ensures their reliability and integrity and also allows for their timely and efficient retrieval both for the court's use and to respond to requests for public access.

Clerk-magistrates may, as appropriate, remind police departments and other parties that submit reports to the court that by law such reports, once filed, are usually accessible to the public. Since the clerk-magistrate has no authority to remove or redact information that by law is publicly accessible in court files, such parties may be encouraged to redact superfluous sensitive or highly personal information from such reports before they are filed.

Clerk's office personnel must be certain that any documents or information that has been impounded by a judge or that is categorically unavailable to the public by statute or court rule is either filed separately or removed from the case file prior to any public examination of the case file.

Commentary

When permissible under the rules that govern public access to court records, Clerk's office personnel should attempt to protect the privacy interests of parties involved in criminal cases. See Standard 5:04. Of particular concern should be maintaining privacy with respect to the names of sexual assault victims (see G.L. c. 265, § 24C), mental health, medical and criminal history records, and personal information that could be utilized for identity theft (e.g. social security numbers).

The criminal case file should include all public documents about the case including reasons for bail forms, bail recognizances, detention orders, pretrial conference reports, certificates of discovery compliance, tender of plea forms, probation orders, findings on probation violations, and any documentary exhibits retained in court custody. The file should identify where any other case-related materials are located.

District Court Special Rule 211 requires that the electronic recordings of most criminal matters presided over by a judge must be retained for at least 2½ years. Any electronic recording of facts upon which a magistrate relied in authorizing a criminal complaint should also be retained for at least 2½ years, since such recordings may be relevant in determining a motion

to dismiss the complaint during the ensuing criminal case.

Supreme Judicial Court Rule 1:11 governs the disposal of old court papers and permits destruction of most criminal records (other than docket sheets) five years after the conclusion of the case.

5:04 Criminal case files: public access

Once a complaint is issued, the application and any supporting information, such as police reports or recordings of oral testimony, are part of the criminal case file. With some exceptions, the contents of criminal case files, whether the case is pending or closed, are available for public inspection.

The magistrate's duty to facilitate such access is balanced by a duty to protect the security of the records under his or her control. The right of public access is subject to reasonable time and place limits.

Among the items in criminal case files that are not available for public inspection are the following:

- **Materials impounded by a judge (Trial Court Rule VIII)**
- **Sealed cases (G.L. c. 94C, § 34, 44; c. 127, § 152; c. 276, §§ 100A-100C)**
- **Names of victims of specified sexual offenses (G.L. c. 265, § 24C)**
- **Photographs of certain unsuspecting nude persons (G.L. c. 272, § 104[g])**
- **Police reports held by the Clerk's office solely to be given to the defense as discovery (Dist./Mun. Cts. R. Crim. P. 3[a]) and not considered in authorizing the complaint**
- **Mental health, alcohol and drug abuser reports (G.L. c. 123, § 36A)**
- **Records deposited as potential exhibits but not yet introduced in evidence (G.L. c. 233, §§ 79 & 79J; *Commonwealth v. Dwyer*, 448 Mass. 122 [2006])**
- **Victim impact statements at sentencing (G.L. c. 279, § 4B; Mass. R. Crim. P. 28[d][3])**
- **Applications for waiver of fees or costs by indigent persons (G.L. c. 261, §§ 27A-29)**
- **Juror questionnaires (G.L. c. 234A, § 23).**

Commentary

The Code of Professional Responsibility for Clerks of Courts requires that each clerk-magistrate shall "facilitate public access to court records that, by law, are available to the public and shall take appropriate steps to safeguard the security and confidentiality to court records that are not open to the public." S.J.C. Rule 3:12, Canon 3(A)(6).

The names and addresses of alleged victims are generally publicly accessible when included in a publicly-accessible filing. However, G.L. c. 265, § 24C provides that the names of alleged victims of six specified sexual offenses "shall be withheld from public inspection, except with the consent of a justice of such court where the complaint or indictment is or would be prosecuted." Note that the remainder of any police report or other statement of fact relied upon by the magistrate to determine probable cause is a public record, as the statute authorizes withholding only the name of the alleged victim.

Since the purpose of the statute is to protect the identity of the victim of a sexual assault,

it is desirable that criminal case files do not directly or indirectly disclose that identity. Police officers and other complainants should be encouraged to redact from their statement of facts any identifying information about the victim (e.g., the victim's address or the parent's address in the case of a minor victim). In appropriate situations, a magistrate may inform the complainant that he or she may ask a judge to impound non-essential personal or identifying information that has not been redacted from such filings, pursuant to Trial Court Rule VIII, the Uniform Rules on Impoundment Procedure.

It is preferable to rely only upon written reports in satisfying Mass. R. Crim. P. 3(g) in cases involving sexual offenses, since it may be nearly impossible to redact an alleged victim's name from an electronic recording of oral testimony.

5:05 Impoundment of criminal complaints

Consistent with controlling law, a judge has authority to impound or redact court records which contain sensitive information. An impoundment order may be granted with notice, or ex parte in a clearly meritorious case. A request for impoundment may be made prior to the material being filed.

Commentary

For the procedure on impoundment, see Trial Court Rule VIII, Uniform Rules on Impoundment Procedure. See also *Republican Co. v. Appeals Court*, 442 Mass. at 225 n.11 & 227 n.14, 812 N.E.2d at 893 n.11 & 895 n.14 (2002) (Uniform Rules are to be followed “as closely as possible” in criminal as well as civil cases); *Globe Newspaper Co. v. Commonwealth*, 407 Mass. 879, 556 N.E.2d 356 (1990); *Gere v. Frey*, 400 Mass. 326, 509 N.E.2d 271 (1987); *Ottaway Newspaper Co. v. Appeals Court*, 372 Mass. 539, 362 N.E.2d 1189 (1977).

“[There is a right] for victims and witnesses, to be informed [by the District Attorney’s office] of the right to request confidentiality in the criminal justice system. Upon the court’s approval of such request, no law enforcement agency, prosecutor, defense counsel, or parole, probation or corrections official may disclose or state in open court, except among themselves, the residential address, telephone number, or place of employment or school of the victim, a victim’s family member, or a witness, except as otherwise ordered by the court. The court may enter such other orders or conditions to maintain limited disclosure of the information as it deems appropriate to protect the privacy and safety of victims, victims’ family members and witnesses.”

G.L. c. 258B, § 3(h).

The Clerk’s office does not have the right to withhold information in a criminal case file from public access unless it is unavailable to the public by statute or court rule or has been impounded by a judge. If a magistrate is concerned that sensitive information is about to be filed in a case, the magistrate should first determine whether there is a need for the information to be in the file. If not, the magistrate may suggest to the filing party that such information be redacted prior to filing. If it appears that the information is needed but should not be publicly available, the magistrate might suggest that the filing party speak with the District Attorney’s office about seeking an impoundment order.