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December 15, 2017

Clerk Joseph Stanton
Massachusetts Appeals Court
John Adams Courthouse
One Pemberton Square
Room 1200
Boston, MA 02108

Re: Comments on the Appeals Court's Proposed Order Concerning Electronic Filing and Related Amendments

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Dear Clerk Stanton,

On behalf of the Boston Bar Association ("BBA"), we thank you for the opportunity to comment on the Appeals Court's Proposed Order Concerning Electronic Filing.

The invitation to comment was distributed to all BBA Sections, and the Steering Committees of the Business and Commercial Litigation Section and the Civil Rights and Civil Liberties Section discussed it at length and proposed the attached comments. Please note that the enclosed document does not constitute a position of the BBA as a whole but rather reflects the views of the individual members of the Committees. We hope it may be useful to your consideration of the proposed order.

Thank you for providing members of the bar with an opportunity to weigh in on this important proposal and please feel free to contact me should you have any questions or concerns.

Very truly yours,

Mark Smith
President

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**Comments of the Boston Bar Association’s Business and Commercial Litigation Section
and Civil Rights and Civil Liberties Section on the Appeals Court’s Proposed Order
Concerning Electronic Filing and Related Amendments
(December 15, 2017)**

In response to an invitation for comments from the Appeals Court, the Boston Bar Association’s (“BBA”) Business and Commercial Litigation Section and Civil Rights and Civil Liberties Section reviewed the Proposed Order Concerning Electronic Filing and Related Amendments. The BBA notes that these comments do not represent a formal position of the Association but rather are a collection of comments from interested committee members intended to help the Appeals Court in its consideration of the proposed protocol.

Members of the Business and Commercial Litigation Section expressed support for the addition of Section E.1, which provides that the e-filing of impounded material is not mandatory. However, since this may appear inconsistent with the broad statements regarding mandatory e-filing in Section C, it may make sense to cross-reference Section E.1 in that prior section. For instance, the first sentence of Section C could be amended to read, “Subject to the provisions of Section E.1, the following documents filed by an attorney . . .” which would make it clear from the outset that the e-filing of impounded material is not mandatory.

In addition, Sections C.1 and C.5 would require the e-filing of “all filings” in “public and partially impounded” *criminal* panel and *single justice* cases, while Section C.2 requires the e-filing only of “all briefs and appendices” in public and partially impounded *civil* panel cases. (Section C.4 applies equally to all cases, requiring the e-filing of “all motions and letters filed after panel assignment.”) Thus, pre-hearing motions and other filings must be e-filed in some cases, but not others. Member felt if there was no practical reason for this distinction (and they could think of none), it would make sense to eliminate the distinction so that the e-filing requirements apply with equal force to all cases.

Members also found the language in Section E.4 to be unclear, where it states that “[t]he confidentiality of an electronic record or an electronic or paper copy thereof is equivalent to that of a paper record.” They assumed this was meant to convey that, just because an impounded record is filed electronically, it is not any less confidential. If so, members thought it could perhaps be re-phrased more clearly as, “any impounded material that is e-filed shall be entitled to the same protections that it would enjoy if it were filed manually.” Finally, members noted that the word “Enotices” in Section E.4 should instead read “E-notices.”

Members of the Civil Rights and Civil Liberties Section wished to commend the Appeals Court on its efforts to account for access-to-justice concerns in drafting the Proposed Standing Order. Members of the Committee pointed to the specific provisions that make registration and e-filing voluntary for pro-se litigants and that exempt entirely those confined in an institution. Additionally, the Committee supports the proposal to install a public access terminal and scanning station in the Appeals Court Clerk’s Office, which may be used by parties who wish to e-file without paying fees for doing so. Members noted that these provisions will help to reduce access-to-justice barriers for those who may not have the resources, knowledge, or ability to e-file in the same manner as attorneys.