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February 22, 2017

Catherine M. Coughlin
State Bail Administrator
Suffolk County Courthouse
Three Pemberton Square
Room 320
Boston, MA 02108

Re: Comments on Proposed Rules Governing Bail Magistrates and Bail Commissioners

Dear Catherine M. Coughlin,

On behalf of the Boston Bar Association (BBA), I thank you for the opportunity to comment on the proposed Trial Court Rules Governing Bail Magistrates and Bail Commissioners. The BBA appreciates and recognizes the efforts put forth by the Trial Court Bail Committee in recommending these revisions.

The proposed initiatives were distributed to all BBA Sections. The BBA's Criminal Law Section discussed the initiative at length and Section members 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 individual members of the aforementioned groups. We hope that they may be useful to the Trial Court Bail Committee as it considers the proposed revisions.

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

Very truly yours,



Carol Starkey
President

**Comments of the Boston Bar Association's Criminal Law Section on Proposed Trial Court
Rules Governing Bail Magistrates and Bail Commissioners
February 22, 2017**

In response to an invitation for comments from the Trial Court Bail Committee, the Boston Bar Association's ("BBA") Criminal Law Section has reviewed the proposed Trial Court Rules Governing Bail Magistrates and Bail Commissioners ("Proposed Rules"). The BBA notes that these comments do not represent a formal position of the Association, but rather are a collection of comments from interested Section members intended to help the Trial Court Bail Committee in its consideration of the Proposed Rules.

The Criminal Law Section focuses on the practice of criminal law and the administration of the Commonwealth's criminal justice system. The Section is composed of practicing prosecutors, defense attorneys, agency counsel, and members of the judiciary. The Section's broad-based membership allows it to view new criminal justice-related initiatives from a variety of perspectives. The Section found the Proposed Rules represent a commendable effort to enhance the quality and professionalism of out-of-court bail determinations, as well as the system that administers those determinations. Overall, members of the Criminal Law Section believe that the Proposed Rules generally do a good job of achieving those enhancements.

Certain of the Proposed Rules, particularly Proposed Rule 14, prescribe substantive standards for making out-of-court bail determinations. It is unclear to some members of the Criminal Law Section whether those standards are fully consistent with applicable substantive law. Specifically, and without intending to be exhaustive, members of the Criminal Law Section identified the following areas of concern:

1. The first paragraph of Proposed Rule 14 authorizes a bail magistrate/commissioner to effectively make a "dangerousness" determination for a domestic violence arrestee. This appears to be in tension with Mass. G.L. c. 276, § 42A, and with the holding in Commonwealth v. Aime, 414 Mass. 667 (1992).
2. The second paragraph of Proposed Rule 14 presumes that arrestees are to be released on personal recognizance except for those charged with a crime of domestic abuse. This paragraph appears not to account for non-bailable arrestees. This paragraph also appears to limit the presumption of personal recognizance for domestic abuse arrestees beyond the limitations contemplated by G.L. c. 276, § 42A.
3. The third paragraph of Proposed Rule 14 authorizes a bail magistrate/commissioner to impose certain types of conditions on the release of any arrestee. The language of G.L. c. 276, § 58, however, authorizes a bail magistrate/commissioner to impose different types of conditions on: the release of (a) a domestic abuse arrestee; versus (b) a non-domestic abuse arrestee. Cf. Commonwealth v. Yancey, 46 Mass. App. Ct. 924 (1999).

Accordingly, the members of the Criminal Law Section respectfully suggested that the Trial Court Bail Committee make these and any additional revisions necessary to ensure that the Proposed Rules are fully consistent with applicable substantive law.