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June 15, 2017

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Re: Comments on the Proposed Amendments to Rule 1:11 of the Rules of the Supreme Judicial Court

Dear Attorney Burak,

On behalf of the Boston Bar Association (BBA), we thank you for the opportunity to comment on the proposed amendments to Rule 1:11 of the Rules of the Supreme Judicial Court (SJC) and recognize the efforts put forth by the SJC Rules Committee in drafting these amendments to the rule.

The proposed initiatives were distributed to all BBA Sections, and the Business and Commercial Litigation Section discussed them 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 individual members of the various Business and Commercial Litigation Steering Committee. We hope that they may be useful to the Rules Committee as it considers the proposed revisions.

In addition, the BBA Council engaged in multiple conversations on the proposed amendments and Rule 1:11. A few key points emerged from these discussions. As attorneys, we recognize the need for courts to have an efficient mechanism for storing, preserving, and disposing of records. At the same time, many legal records contain a great deal of historical significance. We urge that any rules related to the preservation and disposition of documents keep in mind the importance of conserving the legal history of the Commonwealth, including those materials of more recent history, which may only be revealed to be noteworthy many years down the road. We trust the courts will act in accordance with and recognition of the value of maintaining access to records that establish our legal history and will not regret erring on the side of preservation when making decisions related to sampling and disposition.

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 Business and Commercial Litigation Section
Steering Committee on Proposed Amendments to SJC Rule 1:11
(06/15/17)**

In response to an invitation for comments from the Supreme Judicial Court (SJC) Rules Committee ("Rules Committee"), the Boston Bar Association's ("BBA") Business and Commercial Litigation Section Steering Committee reviewed the proposed amendments to SJC Rule 1:11.

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 Rules Committee in its consideration of the proposed amendments.

Members of the Business and Commercial Litigation Section Steering Committee felt there were some ambiguities in the proposed changes to the rules. For example, some members noted the lack of clarity in the "sampling" requirements. They expressed concern that there was no guidance given as to what sampling means in relation to rule, what would be included in the content of a sample, or how the sampling was to be carried out. Members that raised this concern also discussed the lack of a clear or obvious reason as to why sampling would be necessary, especially considering high speed scanners and the downward pressure on the cost of storage. Instead, some felt that preservation of everything may be feasible at an increasingly reduced cost.

Some members also felt it was unclear why Section 5(A) included "Section 4" when providing "[c]ase records not required to be retained pursuant to Section 3 or Section 4 may be destroyed ten years after final disposition of a case provided that..." the requirements of Section 5(A) are fulfilled. Section 4 only addresses meeting the requirements of sampling and does not relate to cases that must be retained, so this provision may benefit from the removal of the first use of "Section 4" language in Section 5(A).

Some members also noted that the rule is currently unclear as to whether those records in Section 6(B) that must be kept permanently should also be retained electronically. These members noted that, given the significance of the records, it could be worth adding clarification that these documents must also be electronically preserved.

Finally, some members praised the fact that the rules were permissive, and not mandatory, noting it was important that the rule, in Section 5(D), allows for clerks to exercise discretion at any time to retain any case records if they could be destroyed under the rule.