

REPORT OF THE COMMITTEE ON MEDIA (BROADCAST AND ONLINE)  
ACCESS TO THE COURT AND PROPOSALS TO AMEND SJC RULE 1:19

The Supreme Judicial seeks comments to proposed amendments to Rule 1:19 regarding media access to the courts. The proposal, along with the SJC Subcommittee summary of the proposed changes are appended to this report along with a redlined version of the changes.

On February 17, 2011, MBA President Denise Squillante established an ad-hoc Committee to make recommendations at the March 10th MBA House Of Delegates Meeting as to how the MBA should respond to the proposed amendments. The Committee is composed of:

Lee Gartenberg-Chair  
Peter Elikann  
Michael Fabbri  
Marc Fitzgerald  
Michael Flores  
Fern Frolin  
Radha Natarajan

The Committee met three times by phone on February 22nd, March 1st, and March 8th.

At the January meeting, the House of Delegates voted to oppose proposed Rule 1:19. President Squillante charged the committee with the following tasks:

- 1) Further examination of proposed Rule 1:19,
  
- 2) Consideration of the more global issue of striking a balance between the right of access to the courts of electronic media under the First Amendment to the U.S. Constitution, the Sixth Amendment Right to a Public Trial, considerations of Due Process under the state and federal constitutions, and the need, where possible to protect the privacy of parties, victims, witnesses, jurors, and anyone else who might somehow be involved in a court proceeding.

The Committee also discussed the effect of two phenomenon that exist as a result of the technological advancements, the proliferation of the blogosphere and the presence of bloggers in the court room, and the prospect of court proceedings being streamed online in real time. Materials are appended to this report regarding a pilot project being undertaken by radio station WBUR and Quincy District Court to stream its proceedings online.

The Committee had detailed discussions and was in the process of formulating recommendations, when the Supreme Judicial Court issued a ruling on March 7th regarding a party's right to privacy in a court proceeding regarding their Mental Health.

#### The Kirk Decision

Helen Kirk was found not guilty of murder due to mental illness (so-called "insanity") in September of 2007. The Commonwealth sought to have her civilly recommitted to a state hospital pursuant to M.G.L. c. 123 § 16 (c). These court proceedings are normally open to the public. Ms. Kirk sought an order closing the proceedings. The judge denied the motion and she sought review in the SJC.

The court stated that in criminal proceedings, it is settled law that trials are public and that any restriction on access must serve an overriding interest and be narrowly tailored. This is due to the fact that in civil cases in Massachusetts, there is a long standing presumption of trials being open to the public.

The court said that closure may only occur if four requirements are met:

- [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced,
- [2] the closure must be no broader than necessary to protect that interest,

[3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure."

"Thus a moving party's position must be sufficiently compelling to overcome a presumption of openness." *Kirk v. Commonwealth*, \_\_ Mass \_\_ (2011), slip opinion at p. 4. The court determined that the petitioner's assertion "that the dissemination of personal information disclosed in treatment 'may have a devastating effect on her treatment,' while a legitimate and serious concern, is not supported by expert opinion or any other evidence." *Id.* at 5. Thus it held that her concerns did not express an overriding interest that would require closure of the proceedings.

The court did seem deferential to closing some proceedings where the legislature explicitly expressed an interest in closure, specifically citing statutory provisions regarding the privacy of children in care and protection cases, M.G.L. c. 119 § 38, and juvenile hearing pursuant to M.G.L. c. 119 § 65.

#### Effect Of The Decision

The *Kirk* case indicates that the SJC clearly comes down in favor of a presumption of openness of civil proceedings and establishes a heavy burden that a party would have to meet in most civil proceedings, for a court to order closure.

In the view of most members of this Committee, this shifted the balance strongly in favor of open proceedings and makes the ordering of restrictions likely to be rare.

#### Recommendations

##### 1. Proposed SJC Rule 1:19-Generally

The Committee believes that the MBA should continue to oppose the proposed Rule 1:19. The court should safeguard access of the media as appropriate under the First

Amendment. An issue arises given the current realities of the internet and the proliferation of bloggers as to how one defines "media" and determines access.

The current proposal allows access to entities that qualify as "news media" as defined by the proposed rule. "News media" are defined as "organizations that regularly gather, prepare, photograph, record, write, edit, report or publish news or information about matters of public interest for dissemination to the public, and to journalists who regularly perform a similar function." If they qualify and have registered with the Public Information office of the Supreme Judicial Court, they shall be permitted access and reasonable use of electronic equipment to facilitate photography, electronic recording, or transmission of court room proceedings.

The proposal established a different set of protocols for entities that don't fit this definition which would presumably include less conventional media such as bloggers. They can be excluded from having electronic access on a case by case basis in the discretion of the judge.

The Committee is concerned that putting bloggers and less-conventional media in a different category and making their access more difficult may have a chilling effect and may be inconsistent with First Amendment principles of press freedom and court access.

Thus, the Committee believes that less-conventional media should be given equal status to those who qualify as "News Media" under the definition set out in the proposed rule.

## 2. Proceedings In Juvenile and Family and Probate Courts

The Committee proposes that SJC Rule 1:19 should provide different procedural rules for electronic access to the Juvenile and Probate and Family Courts than for the other courts of the Commonwealth. The likelihood of injury arising from public dissemination of

private information about or affecting children and other vulnerable individuals warrants a different procedure.

Although the substantive requirements of *Kirk v. Commonwealth* should apply to all other courts of the Commonwealth, Juvenile Court proceedings, now routinely closed, should remain so for sound reasons of public policy. Proposed Rule 1:19 should therefore be amended before promulgation to exclude all Juvenile Court proceedings.

In the Probate and Family Court, the rights, best interests, welfare and conduct of minors and other incompetent individuals are frequently aired. Most Probate and Family Court proceedings are now open to the public, but many are closed. For example, adoption proceedings, hearings involving claims of child abuse and some custodial matters are closed. In addition, existing court rules require impoundment of certain documents, such as Guardian ad Litem Reports and financial statements. These documents are not electronically available, and no divorce or paternity pleadings are electronically available to the public.

Although the public and news media may attend most Probate and Family Court proceedings, and may access most – but not all – pleadings, *the* current necessity of in-person attendance provides practical obscurity for divorce, paternity and guardianship hearings and papers. The court should continue to protect children from publicity involving their adoption, paternity, custody and guardianship. It should protect them from the details of their parents' divorces and other proceedings in which their best interests, talents, deficits and treatment by others may be discussed in detail.

The Committee proposes that the standards set forth in *Kirk* should apply to Probate and Family Court proceedings. However, in order to protect private and potentially damaging information concerning children and other especially vulnerable individuals from inadvertent disclosure, electronic recording or broadcast of Probate and Family Court

proceedings should require affirmative permission of the presiding judge. Once broadcast or recording is requested, the new rule should require the judge's consent *unless* a statute or court rule *mandates* closure or the judge enters written findings adequate to support denial of the recording or broadcast, i.e., an overriding interest that is likely to be prejudiced, and an order of closure no broader than necessary to protect that interest.

### 3. Privacy and Public Safety Concerns

As it is likely that many parties seeking to completely close proceedings will not meet the heavy burden imposed by the four prong test in *Kirk*, judges should entertain requests to close specific portions of civil proceedings where appropriate, based on general concerns about public safety, the protection of specific individuals from harm or retribution, and the safeguarding of financial data and records where their dissemination could leave a person vulnerable to identity theft or victimization from electronic crimes.