Comment on Trial Court Rule XIV, Paragraph 5(b)

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November 30, 2017

The Honorable Paula M. Carey
Chief Justice of the Trial Court
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Re: Invitation to Comment on Trial Court Rule XIV, Paragraph 5(b)

Dear Chief Justice Carey:

Thank you for the opportunity to provide feedback on the important 21st century question of who should be able to view what civil court records online and under what circumstances. As a legal aid lawyer representing low-income tenants and a researcher studying tenant blacklisting at both the state and national levels,[1] I know that it is not simple to make rules that increase transparency and efficiency in court proceedings but also protect vulnerable families and individuals from being wrongfully denied housing, employment, and credit based on information found in online court databases. We are in new and changing technological and social territory, making it hard to predict exactly how a particular rule will play out in the real world, over time. It is therefore wonderful to see the Court review its rules from time to time, and I hope that the Court will continue to do so, and will look seriously at Rule 5(a) as well in the near future.

When Rule XIV was initially being considered, the Harvard Legal Aid Bureau along with 17 other legal aid organizations and lawyers working with low-income tenants submitted extensive comments outlining the unintended negative consequences of the indiscriminate online publication of all landlord-tenant court records. A good tenant being evicted because her landlord wants to renovate her unit will still face blacklisting just because her name appears online in the MassCourts database. A tenant dealing with a recalcitrant slumlord must think twice before seeking the court's help in getting heat in the winter because her filing of a case will make it much harder for her to move. Minors improperly named on their parents' eviction summonses will face blacklisting when they head out to find their first apartment. And widespread inaccuracies in the MassCourts database – inaccuracies that busy clerks are unable to avoid and that the 93% of tenants who are without counsel can't figure out how to get corrected – make the harmful and unnecessary impact on low-income people even worse.

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[1] *See, e.g.,* Esme Caramello and Nora Mahlberg, "Combating Tenant Blacklisting Base on Housing Court Records: A Survey of Approaches," Clearinghouse Review (Sept. 2017); Esme Caramello and Annette Duke, "The Misuse of MassCourts as a Free Tenant Screening Device," 59 Boston Bar J. No. 4 (Fall 2015).

These problems will persist unless care is taken under both Paragraphs 5(b) and 5(a) to protect tenants. Our earlier comments outlining the problems in greater detail and making concrete suggestions are attached hereto. As we look at what information should be available to attorneys, and to those with whom they choose to share the information, it is important to keep in mind that there are consequences to making the information searchable online in the first place. ***We sincerely hope that the Trial Court will reconsider the decision to put all landlord-tenant information online without restriction, for the reasons set forth in our June 2015 comments.***

Giving attorneys access to even more information than is publicly available will exacerbate the problem, particularly if there are insufficient limits on attorneys' ability to disseminate that information to non-lawyers, like tenant screening bureaus, with purely commercial goals. For that reason, with respect to Paragraph 5(b), ***attorneys' enhanced access to information should be limited to cases in which they have filed an appearance***. This limitation is equally important in criminal cases, for all of the reasons set forth in this letter. Even this change will increase the vast disparity in knowledge and power between attorneys and the 93% of tenants who lack lawyers and thus between landlords, the majority of whom have lawyers and economic and other structural advantages, and tenants, who are generally low-income and often face additional barriers like limited English proficiency or mental disability. If attorneys have enhanced access to information in cases in which they have an appearance, ***pro se parties should have such enhanced access in their own cases***. This will ensure both that pro se parties are not unfairly disadvantaged in their cases and that any attorneys (or social workers, or non-layer advocates) trying to assist pro se parties or assess their cases for potential representation or other services will be able, with the party's help, to access information they may need to provide meaningful help.

In addition, the temptation will be great for some attorneys with enhanced access to profit from that access by selling (or redistributing for business generation purposes or the like) the extra information they find on the attorney portal. As written, 5(b) and the Terms of Use do not clearly prohibit this. ***There should be specific limits in the rule and/or terms of use clarifying that information gained through the attorney portal cannot be sold or used for commercial purposes.*** This will help ensure that lawyers are not tempted to sell their enhanced access to tenant screening bureaus, background check companies, or other third parties who are not intended to have special access to the information and will use it to make money by creating barriers to full civil and economic participation for low-income people.

Finally, as time goes on, we will learn more about the real-world impact of the Trial Court's online access rules on vulnerable individuals in different civil litigation contexts, including family law, housing, and consumer debt. It is important that the Trial Court Departments – especially the Housing Court, with its specialized expertise and access to feedback on what is happening in the affordable housing world – retain the ability to petition the Chief Justice of the Trial Court to exempt specific case (or information) types from remote access in the attorney portal. ***The importance of giving the Departments this role is recognized in 5(a)(iii) and should be incorporated into 5(b) by adding "and civil" between the words "criminal" and "case" in the last line of the paragraph.***

Please feel free to contact me at (617) 384-5591 or ecaramello@law.harvard.edu if I can answer any questions or provide further information on this important topic.

Sincerely,

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May 4, 2016

Hon. Peter M. Lauriat, Chair
Public Access to Court Records Committee
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Re: Comments on Proposed Trial Court Rule XIV as Applied to Landlord-Tenant Cases

Dear Judge Lauriat and Members of the Committee:

First and foremost, we wish to thank the Committee for the hard work it has done in crafting the proposed Uniform Rules on Public Access to Court Records. The technologies of the 21st century offer the public unparalleled access to our courts, allowing us more easily and fully to pursue justice in individual disputes and to observe the workings of the court system and learn from the stories that unfold there. The democratization of access to information and systems is one of the great movements of our time, and it is heartening to see the Trial Court and the Committee moving boldly to ensure that our court system is part of it.

As the Court wades into this exciting but unfamiliar territory, however, we ask that it pay particular attention to the real harm that broadcasting personal information, irreversibly, on the Internet can have on people who are already very vulnerable. For all of us, the publication of our court records online might be embarrassing. For some, especially people with low incomes, people of color, immigrants, people with disabilities, and others who already face significant barriers to securing housing, jobs, and other basic life necessities, having entries in masscourts.org ("MassCourts") remotely accessible for free, 24 hours a day, to anyone in the world with access to a computer or a phone, can have a dramatic impact on their lives and families. As we have recognized in other contexts, as with the Legislature's recent reform of the CORI system, the public interest is best served by systems that minimize these harms as much as possible consistent with the public policy in favor of broad and equal access to information.

As legal aid and private lawyers practicing landlord-tenant law in both the Housing and the District/Municipal Courts we observed a major change once the court made housing case records freely available online: our clients, who are already so poor that their housing choices are severely limited, are now being rejected more often for the few apartments they can afford when their names appear on MassCourts. Moreover, tenants are increasingly wary of exercising their legal rights because of the impact that having a court "record" will likely have on their future housing searches. We have heard similar stories from tenant advocates across the state and the

country. We therefore write to share what we have seen and to ask that the Committee consider changes to proposed Rule XIV to address the greatest problems. Specifically, with the support of legal aid programs across the state, we recommend that the final rule:

- Provide that in landlord-tenant cases, parties' names be displayed only as initials in the online version of the database;

- Set forth clear procedures and short timelines for the correction of errors in the masscourts.org database ("MassCourts"), allowing clerical errors to be corrected by clerks without judicial involvement; and

- Establish a procedure by which parties may, for good cause, request removal of their cases from the remotely accessible database.

While these changes will not eliminate the problems we identify, they will help to minimize them. *It is crucial that these efforts take place at the Trial Court level*, because housing cases are brought not only in the Housing Court, which does not extend statewide, but also in the District/Municipal Courts. Deferring these questions to the individual departments risks creating a patchwork of unequal rights and remedies for litigants across the state. Moreover, *it is important that protective steps be taken on the front end, before the Court broadcasts sensitive material*, given the practical and legal limitations on what the Court may do to limit the use or abuse of the material once the Court has published it online.

The Problem: Over-Screening, Blacklisting, and a Chilling Effect on the Exercise of Important Rights

When the Court first put landlord-tenant records online on MassCourts, the system was celebrated by landlords as "a powerful new and free tool for tenant screening," the result of "years of lobbying from real estate groups." *See* "Massachusetts Housing Court And Tenant Eviction History Now Online," April 24, 2013, http://massrealestatelawblog.com/2013/04/24/massachusetts-housing-court-and-tenant-eviction-history-now-online/. In principle, there is nothing wrong with a landlord's conducting a background check on a potential tenant. But screening based on overly broad or impermissible criteria – like having any sort of housing litigation history, or having children or a Section 8 voucher – or based on inaccurate information – as where the system displays a false negative outcome like a money judgment owed to a landlord – can unfairly and even unlawfully deprive people of access to important resources, including stable housing. Allowing remote access to landlord-tenant records on MassCourts makes this kind of blacklisting too easy to do and too hard to identify and prevent. Following are specific examples of problems that we have seen exacerbated by remote access to MassCourts:

1. **Tenants are blacklisted for accessing the court system for any reason and are thus deterred from exercising their legal rights.**

Tenants often appear in MassCourts for reasons other than a failure to pay rent or a violation of their leases. One of my current clients was just evicted from her home of 17 years because the landlord wants to sell the building in which she lives and use the proceeds to fund

his retirement. In another current case, my client's minor children have been improperly named as defendants by an overzealous landlord; they now have an eviction "record." Tenants in Worcester were (properly) named as defendants in the city's action against their delinquent landlord because the city wanted the court to order that their rent payments be paid into escrow rather than directly to the landlord. Tenants are sometimes forced to bring cases against their landlords directly when emergency repairs are not made, locks are changed, security deposits are stolen. All of these tenants appear in the MassCourts database, and when they go to look for apartments, they are red-flagged.

Certainly, not all landlords reject tenants merely because they appear in an online court database. But plenty do, in Massachusetts and elsewhere.[1] For example, a tenant in Central Massachusetts was recently rejected by a MassHousing-financed development based on a tenant screening report showing "any LL-T activity" in the previous 48 months. It took significant work by a legal aid lawyer to get the decision reversed, and virtually no tenants have access to such services. Tenants who successfully exercise their legal rights can, in fact, be at even greater risk than those who are quietly evicted for nonpayment of rent. As Massachusetts landlord Elmir Simov put it on his blog last summer:

> If I see that a prospective tenant has ever had a lawyer in any proceeding at http://www.masscourts.org as of this case forward I no longer take them as a tenant. This is a free country. They certainly have a right to hire a lawyer and I have a right to not take them as tenants because of that. http://massachusettslandlords.com/42f/ (June 12, 2015).

The legitimate fear of this kind of backlash deters tenants from going to court when they have every right to do so. Indeed, some landlords are using tenants' widespread fear of having a "record" to extort benefits from them in exchange for a mere promise not to file a case. As one landlord put it in a November 2015 letter to a tenant, in which the landlord sought to persuade the tenant to agree to be evicted, pay for maintenance that was the landlord's legal responsibility, and pay the landlord an hourly rate for any time he spent trying to evict her:

> If everything goes to plan, then it won't go to court. But once the summary process is served and filed, you will have a permanent record in housing court. Even if we reach an agreement without going before the judge or if we just ask for dismissal and never go to

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[1] The practice of refusing to rent to tenants based solely on court filings, rather than dispositions, has been documented and addressed in other states, as well. *See, e.g.*, Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 Yale L. Rev. 1344, 1347 (Apr. 2007) (quoting a tenant screening bureau as saying, "it is the policy of our [landlord] customers in New York to flat out reject anybody with a landlord-tenant record, no matter what the reason is and no matter what the outcome it, because if their dispute has escalated to going to court, an owner will view them as a pain"); Eric Dunn and Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 Seattle J. Soc. Just. 319, 336 (2010-2011) (finding that in much of Washington, residential landlords commonly reject any applicant who has been involved in an eviction case regardless of the outcome); NY State Bar Association, LegalEase: The Use of Tenant Screening Reports and Tenant Blacklisting (2013), p. 9, http://old.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=153855 (noting that merely appearing on lists leads to blacklisting and advising tenants on how to invoke protections that do not exist in MA). *See also* Massachusetts Housing Court and Tenant Eviction History Now Online, *supra* (describing value of MassCourts not as giving access to specific information about a person's case but "whether [she] has been a party to a previous eviction, small claims or related housing case."

court. If you win sanctions against me and you can say you won in court. Do you think that will make any prospective landlords feel better about renting to you?

This pressure exists, of course, regardless of whether the landlord vocalizes it.

These are just a handful of examples of the many ways that the current system and proposed Uniform Rules, by making tenants' court records available online and searchable by name, facilitate abusive screening practices and deter tenants from accessing our justice system to vindicate important rights.

2. Tenants generally cannot prevent their records from appearing online, even for good cause.

When the tenants mentioned above were sued by their city – the city they had called for help when their landlord refused to make critical repairs to their home – in a declaratory judgment action despite the fact that everyone involved acknowledged that the tenants had done nothing wrong, the tenants were suddenly faced with reduced access to housing in the future. So they filed a motion to dismiss, which was granted, and a motion to remove their names from MassCourts' *online* database. The Housing Court judge was sympathetic and took the request seriously, continuing the case to the afternoon to give the matter some thought. In the end, however, the judge determined that it was not within the court's power to grant the relief the tenants requested. Needless to say, the tenants (and those to whom they tell their story) will be reluctant to call the government for help the next time around.

Because there is effectively no mechanism short of impoundment to protect tenants from online publication of their court records, some have tried that remedy. But impoundment is a square peg for a round hole. As retired Chief Justice of the Housing Court Steven Pierce observed more than once, "While the defendant may be correct in her perception that public record of these summary process actions is hampering her housing search, that alone does not establish good cause to impound [the] actions." *Peabody Properties v. Small*, 00-SP-00811 (September 8, 2008). Impoundment, with its First Amendment implications, may also be an over-inclusive remedy, if the relief sought is merely removal from the online version of the database.

3. The MassCourts database is rife with inaccuracies that harm tenants, and there is no clear, well-understood process for correcting them.

Compounding the problem of overzealous screening is the fact that a significant portion of the information published online is inaccurate in ways that harm tenants. And as court personnel have confirmed both informally and publicly, and as tenant advocates' experience shows, there is no clear procedure for correcting such errors. Following are a few examples:

- In 2014, a student of mine, Nora Mahlberg, conducted a study of 47 housing cases that our office had closed in calendar year 2013. For each, she looked at the case "disposition" on MassCourts and compared it against the actual outcome of the case according to our case file. In just that small sample from our office alone, Ms. Mahlberg found 4 cases – almost 10% -- in which MassCourts displayed a judgment of eviction against the tenant when in fact there was no such judgment.

- In early 2015, an experienced legal aid lawyer plugged just her own name into the system and drew 36 "Active" summary process cases that were not in fact active. All had in fact been resolved. Another tenant lawyer did the same and found that a number of his active cases were missing from his list, while his list included one case where he had no connection whatsoever to the tenant.

- As detailed in the written submission of Mac McCreight of Greater Boston Legal Services to the Committee prior to the release of the Proposed Rules, summary process plaintiffs sometimes, in a misguided attempt to cover their bases, name every adult in a household, and sometimes even minor children, even though the head of household is the only legally responsible tenant.[2] This is particularly inexcusable in subsidized tenancies, where with limited exceptions state and Federal law require the lease to identify explicitly all persons with contract obligations.

- A tenant in Western Massachusetts was unable to co-sign a car loan for her son because of an erroneous entry of a judgment for $3,300 that a clerk had made in her eviction case months earlier. In fact, the tenant had won the case, and the landlord had paid her attorneys' fees. Nonetheless, it took the tenant several years to clear her credit, and she was able to do so only after hiring a lawyer to help her.

- A Greater Boston Legal Services review of its cases in MassCourts revealed that cases were coded as "nonpayment" or "fault" cases when they were in fact filed as "no fault" evictions.

- In cases where the parties have settled, after negotiation, for an agreement that does *not* impose a judgment on either party are sometimes coded as "agreements for judgment," which appears to be a judgment against the tenant.

- The "Disposition" box at the bottom of the docket screen often reflects a judgment long after a judgment has been vacated and a dismissal has been entered, either by court order or by agreement. If the first disposition is a judgment, that disposition remains on display despite changes in the status of the case.

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[2] It has long been recognized that persons may be "holding under" the tenant or leaseholder, such as a spouse and children, or sublettors or others who do not stand in the relationship of tenancy with the owner. If the leaseholder or tenant is named, and the owner obtains a judgment of possession and execution in a summary process action against that person, the execution is good to displace such other persons without them being named. See Keith v. Perlig, 231 Mass. 409, 413 (1918); Fiske v. Chamberlin, 103 Mass. 495 (1870).

Such errors are not easy to correct. As court personnel have confirmed both informally and publicly, there is no clear and well-understood – much less published – mechanism for tenants to request correction of even obvious database errors. This leads to unequal treatment in different courts and on different days, to delays at times when tenants are trying to move and desperately need clean records, and at times to the failure to correct errors altogether.

Solutions from Other States

Some states grappling with the negative impacts of publishing case information online have developed solutions that seek to balance the public's interest in access to court information with the legitimate privacy interests of litigants. Following are a few approaches taken by other states in response to some of the problems noted above.

New York: The New York court system once distributed landlord-tenant case information electronically, on a daily basis, for a fee. In response to concerns about the "blacklisting" of tenants and the chilling effect it was having on the lawful exercise of their housing rights, **the court agreed, in 2012, to remove tenants' names from the electronic feed.** *See* Hon. Gerald Lebovits and Jennifer Addonizio, "The Use of Tenant Screening Reports and Tenant Blacklisting," New York State Bar Association (2013). Applauding this action "to protect both New York's tenants and the integrity of the court system," one legislator explained: "When the fear of being 'blacklisted' causes many tenants to avoid the court and relinquish their legal rights, access to justice is fundamentally undermined." Sen. Krueger Announces Courts to End Electronic Sale of Housing Court Data Used in "Tenant Blacklists" (2012 Press Release) (https://www.nysenate.gov/newsroom/press-releases/liz-krueger/victory-tenants-sen-krueger-announces-courts-end-electronic-sale).

California: Under California Code of Civil Procedure §1161.2, **landlord-tenant records are not made available to the general public for 60 days**, with early release by court order available upon a showing of good cause, including "gathering of newsworthy material". This period can be extended by the Court for good cause. Cases are not broadly disseminated if the tenant wins or the issues are favorably resolved before the "masking" period expires.

Minnesota: In 2015, Minnesota adopted Minn. Stat. § 484.014, under which **a tenant can obtain the expungement of an eviction record** upon a showing that the landlord's case is "sufficiently without basis in fact or law" and expungement is "clearly in the interests of justice," taking into account any potential public interest in the information. In certain post-foreclosure eviction cases, expungement is mandatory upon motion.

Washington: Earlier this year, Washington passed Senate Bill 6413 (2016), which created a **procedure for courts to flag an eviction file for "limited dissemination"** if the case was without basis or was dismissed on certain grounds, or for other good cause. The bill further created a more transparent and centralized tenant screening system that makes error correction easier and minimizes the credit damage that tenants suffer during a housing search, when multiple landlords pull their credit reports within a short period of time.

While none of these might be the perfect solution for Massachusetts, the fact that three of the four measures were adopted in just the last four years highlights the current existence of a significant problem and the need for creative solutions.

Recommended Revisions to Proposed Trial Court Rule XVI

To help address the problems identified above, we ask that the Court implement the following changes to the proposed Rule.

1. **In landlord-tenant matters, display names remotely using initials only, rather than full names.**

Revise Rule 5(a)(1)(i)(A) by adding the underlined portion below:

5(a)(1)(i) [Civil cases] Generally.... [T]he following information shall be viewable remotely in civil court records:

(A) The full name of each party and the related case or case number(s) by court department and division, except that in all cases docketed in the Housing Court or within the subject matter jurisdiction of the Housing Court, including without limitation residential summary process cases and actions under G.L. c. 111, § 127C et seq. to enforce the State Sanitary Code, but docketed in the District Court or the Boston Municipal Court, only the initials of the party shall be viewable remotely.

2. **Establish a procedure by which parties may, for good cause, request removal of their cases from the remotely accessible database.**

Add the following subsection to Rule 5: Remote Access to Electronic Court Records:

(a)(1)(iv) Motion to Limit Remote Access. At any time during or after the pendency of a civil action, a litigant in a civil case may petition the Court to limit remote access to some or all of the docket information displayed under this rule. The Court shall grant such a motion upon a showing of good cause. In cases involving the occupancy of residential premises, good cause shall include:

(A) That the party was improperly named in the action;
(B) That all claims brought against the party in the action were dismissed by agreement or Court action;
(C) That the party was the plaintiff in an action brought to enforce the party's legal rights, and remote access to the court record may have a prejudicial effect on the party; or
(D) That the benefit of remote access is outweighed by the prejudice to the requesting party of having the information displayed online.

The procedure provided for under this section shall apply to remote access only, and all records shall remain available and searchable at the courthouse, unless impounded or otherwise restricted by law or rule. Any motion filed under this section shall be served on all parties to the action and shall be heard within seven (7) days.

3. **Set forth clear procedures and short timelines for the correction of errors in the MassCourts database, allowing clerical errors to be corrected by clerks without judicial involvement.**

Delete the strikethrough text and add the underlined material to Rule 6: Correction of Clerical Error in Electronic Docket Entry:

Any party, non-party, or their attorney may make a written request to correct a clerical error in an electronic docket. Such a request may be made using a form that ~~can be found~~ shall be made available online at masscourts.org ~~or at any~~ and at each Clerk's office. The completed form must be submitted to the Clerk's office where the court record in question is physically located and to all parties. If the form, including any supporting materials filed therewith, appears regular and complete on its face and indicates that the electronic docket entry contains a clerical error, the Clerk shall grant such request forthwith without hearing and without the necessity of appearance of any party or counsel.

Should the Clerk deem a hearing to be necessary, or upon the filing of a response by any other party to the request for correction, a hearing shall be held promptly and no later than three (3) days following the request for correction or response thereto filed by any other party.

NOTE

This Rule is intended to allow parties and nonparties to alert the Clerk to a potential clerical mistake or error, but does not apply to the correction of errors of substance. The Rule recognizes that certain errors can cause prejudice to the parties and thus provides for prompt resolution of requests for correction. For further process see Mass. R. Civ. Pro. 60 and Mass. R. Crim. Pro. 42.

Comment on Other Issues in the Proposed Rule

We also endorse and encourage the Court to carefully consider the comments submitted by Pauline Quirion of GBLS regarding the display of criminal case records and guidelines for granting requests for compiled data. Furthermore, we echo the call for the Court to suggest to the Supreme Judicial Court that it solicit further comments before finalizing the rules, and that any future standing committees on access to court records include representatives from civil legal aid organizations specializing in housing matters and criminal records reform, given the dramatic impact the Court's decisions in this area have on our clients.

Thank you again for your time and attention to these important issues.

Very truly yours,

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