

SURVEY OF GREATER BOSTON AREA COURT PROCEDURES FOR CRIMINAL RECORD SEALING

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Background

Section 100C of Chapter 276 provides for automatic sealing of criminal cases that end in a not guilty finding and permits sealing of cases that ended in a dismissal or nolle prosequi when sealing of the record furthers substantial justice. The First Circuit Court of Appeals found that sealing of cases under this provision is unconstitutional unless a court finds that there is a compelling interest in sealing the record that outweighs the public's First Amendment right of access to the record. Globe Newspaper v. Pokaski, 868 F.2d 497, 507 (1st Cir. 1989). The First Circuit suggested that courts use a two-stage hearing process to address the constitutional infirmity of the statute. The first stage is an "informal" or "preliminary hearing" to determine whether the defendant has made out a prima facie case in favor of sealing. Commonwealth v. Doe, 420 Mass. 142, 149-50 (1995). The purpose of this stage is to give the court the flexibility to deny a petition when appropriate without a lengthy court proceeding. If a petitioner succeeds in making a prima facie case, "a more extensive hearing" is held after posting of notice at the courthouse at least seven days before this final hearing. Id. at 150.¹ If the judge allows a petition to seal after a final hearing, the judge must enter findings that sealing of the record effectuates a compelling interest that outweighs the public's interest in keeping the record open. Id.

Present Court Practices

Several divisions of the Boston Municipal Court and District Court schedule all criminal record sealing petitions for a single, final hearing and post public notice of these hearing in advance in the clerk's office. This practice promotes judicial economy, avoids duplicative hearings, and reduces clerical work in the clerk's office while still complying with the Pokaski and Doe constitutional requirements of public notice before a case is sealed.

Most individuals seeking to seal their records are pro se because there is no right to appointed counsel in record sealing cases. Criminal records, nevertheless, create significant barriers to employment, housing and other opportunities. Many individuals seek to seal their records because they are unemployed, underemployed, or denied housing because of their records. The two hearing process is burdensome, time-consuming, and often impractical for disabled, indigent or low income parties without means or money to repeatedly travel to court or pay for childcare. Low-wage and part-time workers often do not have vacation days or flexibility in their schedules. These workers struggle to support themselves and their children and can ill afford any time off.

Evidentiary hearings are virtually unheard of in record sealing cases. Judges, instead, review the petitioner's CARI, hear arguments from petitioners and/or any counsel, and review the court file, support letters, affidavits and/or other documents submitted to the court. It is not

¹ If a defendant requests sealing of the record at the conclusion of the criminal case, no further notice or posting is required. Doe, 420 Mass. at 150. In practice, the option of requesting sealing of the case at the time of a dismissal, nolle prosequi, or not guilty finding is underutilized by defense attorneys. Most defendants seek to seal their cases in a subsequent court proceeding *after* the criminal case has closed.

unusual to hear lawyers complain about the amount of time they spent in court related to a two-hearing process because the nature of the two hearings, in practice, is virtually the same.² Legal services programs report that it is very difficult to recruit *pro bono* lawyers to assist indigent clients when sealing of the client's records requires repeated trips to a court to seal a client's cases. These time-consuming and duplicative hearings also reduce the overall number of clients that the Greater Boston Legal Services CORI Project can represent and/or advise related to sealing of criminal records.

Clerk-Magistrates and local courts that have adopted a one-hearing process involving posting of all petitions are to be commended for implementing a more user-friendly process that comports with the law and increases access to justice for indigent and low-income individuals. This approach is consistent with recommendations of the SJC Steering Committee on Self-Represented Litigants aimed at "ensuring meaningful access to justice" for pro se parties and fostering "coordinated, system-wide policies and innovations." Supreme Judicial Court Steering Committee on Self-Represented Litigants, Addressing the Needs of Self-Represented Litigants in Our Courts, 3, 5 (November 21, 2008)

Denial of Due Process

Some judges may deny a petition to seal a criminal record on the papers without a hearing although the petitioner wants a hearing. As a result, some petitioners never have their day in court. Deciding sealing petitions based solely on documents puts litigants who cannot afford attorneys and those with limited English or poor writing abilities at a disadvantage. Low-income individuals whose petitions to seal their records are denied without a hearing may contact Greater Boston Legal Services for an intake or assistance by calling 617-603-1700.

Waiver of Hearings

Petitioners may be permitted to expressly waive a hearing and have their case decided on the papers. This is often ill-advised. Many individuals seeking to seal their records cannot afford an attorney and are not able to put together an affidavit and other documents necessary to make a convincing argument that a record should be sealed. A hearing often allows parties to more easily explain their need to seal their records and address concerns that the judge may have about sealing the records. It also gives the judge the opportunity to ask questions about the case or anything that was filed in court. Furthermore, petitioners (and their attorneys) who attend a hearing get the opportunity to respond to the District Attorney's possible opposition to sealing of the record.

² "To succeed on a petition to seal under § 100C, second par., a defendant must show . . . first at the preliminary hearing and, if the matter proceeds that far, at the final hearing, that the value of sealing to the defendant clearly outweighs the constitutionally-based value of the record remaining open to society." Doe, 420 Mass. at 151 (citing Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 509 (1984)).

CHART OF BOSTON AND SURROUNDING COURT PRACTICES RELATED TO CRIMINAL RECORD SEALING

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	1 or 2 hearing process?	Comments
<i>Suffolk County</i>		
<i>Boston Municipal Court</i> 8 Divisions:		BMC Standing Order 1-09 permits a judge from one division of the BMC to seal cases in other BMC divisions.
Brighton	2	
Central Division	2	
Charlestown	2	
Dorchester	1	This division requires a separate petition for each docket number, although all charges related to the same case may be listed on the same petition.
East Boston	1	
Roxbury	1	
South Boston	2	
West Roxbury	1	Attendance of the hearing by the petitioner may be waived upon request of the petitioner in certain circumstances, such as when an out-of-state defendant has a financial hardship that makes it difficult to attend the court hearing.
Chelsea District Court	2	
<i>Essex County</i>		
Lynn	2	

Peabody	1	This court requires the petitioner to send notice to the police dept., the commissioner of probation, and the district attorney <u>by certified mail</u> . Tip: Indigent clients can fill out an affidavit of indigency and ask for state payment of these special mailing expenses that are not required by the <u>Pokaski</u> or <u>Doe</u> cases.
Salem	2	
<i>Middlesex County</i>		
Ayer	Usually 2 hearings	There may be only 1 hearing after posting depending on the preference of the sitting judge.
Cambridge	1	
Concord	1	
Framingham	1	
Lowell	1	This court requires the petitioner to send notice to the police dept., the commissioner of probation, and the district attorney <u>by certified mail</u> . Tip: Indigent clients can fill out an affidavit of indigency and ask for state payment of these special mailing expenses which are not required by the <u>Pokaski</u> or <u>Doe</u> cases.
Malden	2	
Marlborough	1	
Natick	2	
Newton	1	
Somerville	1	

Waltham	1	
Woburn	2	
<i>Norfolk County</i>		
Brookline	1	
Dedham	1	Hearings are held on Thursdays.
Quincy	1	
Stoughton	Usually 1 hearing after posting	Preliminary hearings are done on the papers. There may be some variation depending on who is the sitting judge.
Wrentham	2	There may be some variation depending on who is the sitting judge.