CHAPTER 29

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Record of the Proceedings

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§ 29.1 LANGUAGE INTERPRETERS

§ 29.1A. APPOINTMENT OF INTERPRETER

1. When Appointment Is Required

Mass. R. Crim. P. 41 and several enabling statutes[1] empower the courts to appoint an interpreter "if justice so requires."[2] That criterion may be satisfied when a defendant, witness, or juror is not fluent in English or is hearing-impaired.

a. The Defendant's Right to an Interpreter

A defendant who has difficulty understanding or speaking English has the right to an interpreter, guaranteed by statute[3] and by the constitutional rights to confront witnesses, to be present at trial, and to the effective assistant of counsel.[4] The right to

[1] G.L. c. 221C (court interpreters generally); G.L. c. 221, §§ 92 (superior court) and 92A (superior court — interpreter for hearing-impaired); G.L. c. 262, § 32 (district court compensation for interpreters); G.L. c. 218, § 67 (Boston Municipal Court); G.L. c. 218, § 68 (East Boston District Court authorized to hire Italian translator).

[2] Mass. R. Crim. P. 41. The Rule further empowers the judge to determine and order reasonable compensation for the interpreter. For a discussion of the need for qualified interpreters, *see* Supreme Judicial Court Commission to Study Racial and Ethnic Bias in the Courts, Equal Justice 33–53 (1994).

[3] G.L. c. 221C, § 2. *See also* Mass. R. Crim. P. 41.

[4] *See* Reporter's Notes to Mass. R. Crim. P. 41 and cases cited therein, including United States ex rel. Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970) (failure to appoint translator denied rights to confront witnesses and to be present at trial; "[t]he adjudication loses its character as a reasoned interaction . . . and becomes an invective against an insensible object"). *See also* United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973) (confrontation clause would be violated by denial of translator; "no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment").

In Commonwealth v. Garcia, 379 Mass. 422, 437 n.7 (1980), the court stated that "the test for both confrontation and effective assistance cases in this context is the

an interpreter extends to the pretrial phase if necessary to permit communication with counsel.[5] By statute, it also extends to hearing-impaired defendants at all phases of the proceedings,[6] with special protection during police interrogation.[7]

The defendant's need for a translator must be demonstrated.[8] However, once the court is put on notice that the defendant has a language disability, it must make it unmistakably clear to him that he has a right to a translator[9] at state expense whether or not he is indigent.[10]

If a translator is available, the defendant has no per se right to a bilingual attorney.[11]

b. Witnesses Requiring an Interpreter

The judge may appoint an interpreter for a witness who speaks only some English and who would be better able to communicate through an interpreter.[12]

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same: was the defendant hampered by a language problem in any meaningful way in presenting his defense?"

[5] Commonwealth v. Garcia, 379 Mass. 422 (1980). *But see* Commonwealth v. Alves, 35 Mass. App. Ct. 935 (1993) ("we know of no authority, and the defendant cites none, which would require police to produce an independent interpreter when questioning a non-English speaking defendant prior to trial").

[6] G.L. c. 221, § 92A.

[7] The arresting officer must procure an interpreter for a hearing-impaired person before interrogation, and no statement may be admitted unless evidence shows that it was taken through an interpreter or after a valid waiver, and was knowing, voluntary, and intelligent. G.L. c. 221, § 92A. *See also* Commonwealth v. Colon, 408 Mass. 419 (1990) (rejecting claim of bias of police translator at confession); Commonwealth v. Kelley, 404 Mass. 459 (1989).

[8] Commonwealth v. Rosadilla-Gonzalez, 20 Mass. App. Ct. 407, 415 (1985); United States v. Carrion, 488 F.2d 12, 14–15 (1st Cir. 1973); Perovich v. United States, 205 U.S. 86, 91 (1907) (whether to appoint interpreter is within court's discretion).

In Commonwealth v. Garcia, 379 Mass. 422, 437 (1980), the S.J.C. afforded the judge "wide discretion" to decide the issue, noting "although factors such as the complexity of issues at trial and the language ability of counsel are significant, the crucial factor is the level of fluency of a given defendant." *See also* United.States v. Gonzalez-Ramirez, 561 F.3d 22 (2009) (court did not abuse its discretion in denying defendant's request for an independent translator and allowing detective's testimony translating defendant's confession and recorded phone calls, even though detective was not certified as translator).

[9] *Compare* United States v. Carrion, 488 F.2d 12, 15 (1st Cir. 1973) *and* United States ex rel. Negron v. New York, 434 F.2d 386, 390–91 (2d Cir. 1970) (right to translator, at state expense if defendant indigent) *with* United States v. Barrios, 457 F.2d 680 (9th Cir. 1972) (no abuse of discretion not to appoint interpreter where judge not informed of any need for one).

[10] Reporter's Notes to Mass. R. Crim. P. 41.

[11] Commonwealth v. Brito, 402 Mass. 761, 766 (1988); Commonwealth v. Garcia, 379 Mass. 422, 436 n.6 (1980).

c. Jurors

A variety of issues may arise when jurors speak another language. If the juror speaks a foreign language that will be used by a witness, the court has the discretion to excuse the juror or retain him;[13] one problem is that the juror might hear testimony that should have been excluded.[14] Jurors who do not speak English have not generally been seated, but if the juror is hearing-impaired, the judge may appoint an interpreter to assist him during trial and deliberations.[15]

2. Obtaining an Interpreter

A judge or clerk-magistrate may appoint an interpreter.[16] If the defense needs an interpreter for pretrial interviews with the defendant or witnesses or to translate for the defendant at court proceedings, counsel should file a motion asking the court to appoint one. If possible, the motion should be filled at least forty-eight hours before the need will arise,[17] and for more exotic languages where few translators are on the roster, preferably longer. After the motion is approved, the clerk (or, in some instances, the attorney) will contact one of the offices that provides interpreters, listed below.[18]

3. Qualifications of the Interpreter

Defendants in need of a foreign language interpreter are statutorily entitled to an interpreter who has been qualified in forensic interpreting by the U.S. District Court,

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[12] Commonwealth v. Salim, 399 Mass. 227, 238 (1987). *See also* Commonwealth v. Belete, 37 Mass. App. Ct. 424 (1994) (a court-appointed interpreter is not a "witness" for purposes of G.L. c. 268, § 13B, which prohibits intimidation of witness).

[13] *See* Commonwealth v. Festa, 369 Mass. 419, 429–30 (1976). In Hernandez v. New York, 500 U.S. 352 (1991), the Supreme Court upheld use of peremptory challenges to exclude Hispanic jurors, based on the prosecutors claim that the jurors seemed reluctant to accept as definitive the translator's version of testimony by Spanish-speaking witnesses. However, the court noted that in some circumstances proficiency in a particular language should be treated as a surrogate for race, raising the possibility that exclusion on the basis of language might be unconstitutional in such cases. Racially discriminatory peremptory challenges are discussed *infra* § 30.3C.

[14] Reporter's Notes to Mass. R. Crim. P. 41.

[15] G.L. c. 234A, § 69.

[16] G.L. c. 221C, § 1.

[17] In the Boston Municipal Court, 48-hour notice is required by B.M.C. Standing Order No. 2–83. The request must be renewed for every continuance.

[18] For information on interpreter services see http://www.mass.gov/courts/admin/planning/interpreters.html. The Office of Court Interpreter Services is located at Two Center Plaza , Ninth Floor, Boston, MA, 02108. . (2) Interpreters for the hearing impaired: Massachusetts Commission for the Deaf and Hard of Hearing, Executive Office 150 Mount Vernon Street , Fifth Floor, Dorchester, MA, 02125. . This organization is statutorily charged with maintaining a referral service under G.L. c. 6, § 196.

or if none is available, by the trial court's Coordinator of Interpreter Services.[19] The interpreter should not be a relative and should be disinterested in the outcome of the case,[20] at least where alternatives are available.[21] An interpreter may be removed for grounds specified by statute.[22]

4. Compensation

The integrity of a court proceeding requires an official interpreter when the defendant needs translation, and therefore the Commonwealth pays compensation whether or not the defendant is indigent.[23] Official interpreters may not receive compensation or gratuities beyond the compensation paid by the Commonwealth.[24]

§ 29.1B. WAIVER OF THE RIGHT TO AN INTERPRETER

Waiver is governed by G.L. c. 221C, § 3. Under its provisions, failure of the defendant to request an interpreter is not a waiver of the right to one.[25] Rather, a waiver requires: (1) an explanation in court, through an interpreter, of the nature and effect of

[19] G.L. c. 221C, § 2. Under this legislation at § 7(b), a Committee for the Administration of Interpreters for the Trial Court screens applicants and selects interpreters pursuant to G.L. c. 221C, § 7(b).

[20] Commonwealth v. Kozec, 21 Mass. App. Ct. 355, 365–66 (1985), *rev'd on other grounds,* 399 Mass. 514 (1987) (daughter of complainant, who submitted victim impact statement, should not be used as interpreter). *See* Kozec, 399 Mass. At 526 (agreement by S.J.C.). *See also* Commonwealth v. Bui, 419 Mass. 392 (1995) (no error where interpreter at trial had acted as interpreter in the defendant's police interrogation and as a witness in the hearing on defendant's motion to suppress, as judge had concluded that the interpreter was not biased, and defendant's own interpreter made no claim that the interpreter approved by the judge had translated incorrectly); Commonwealth v. Brito, 402 Mass. 761 (1988) (although more prudent to use impartial interpreter for attorney-client pretrial interview, rather than fellow prisoner who defendant claims to have mistrusted, no showing of prejudice); Commonwealth v. Salim, 399 Mass. 227, 238 (1987) (interpreter was impartial and qualified even though he had talked about the case with the witness before trial); United.States v. Gonzalez-Ramirez, 561 F.3d 22 (2009) (court did not abuse its discretion in denying defendant's request for an independent translator and allowed detective's testimony translating drug conspiracy defendant's confession and recorded phone calls, even though detective was not certified as translator when Spanish was the detective's native language); Commonwealth v. Villar, 56 Mass. App. Ct. 1112 (2002) (single interpreter was not improper for three defendants during pre-trial motions)

[21] *See* Fairbanks v. Cowan, 551 F.2d 97 (6th Cir. 1977) (upholding use of father to translate for retarded son because son had severely impaired speech that could not be understood by most people not acquainted with him).

[22] G.L. c. 221C, § 5.

[23] Reporter's Notes to Mass. R. Crim. P. 41.

[24] G.L. c. 218, § 67; G.L. c. 221, § 92. The rate of compensation is set by a Committee for the Administration of Interpreters for the Trial Court. G.L. c. 221C, § 6.

[25] *Accord* United States ex rel. Negron v. New York, 434 F.2d 386, 390 (2d Cir. 1970).

waiver; (2) consultation between the defendant and counsel; (3) approval by the judge, including a finding that the waiver is voluntary and knowing; and (4) a record that demonstrates the above. Waiver may be retracted at any time during the proceedings. For hearing-impaired defendants represented by counsel, a separate statute also requires that counsel file a written approval of the waiver.[26]

§ 29.1C. INTERPRETER'S ROLE

1. Interpreter's Privilege

Out-of-court communications between the defendant and interpreter are privileged. Out-of-court disclosures to a third person, made through an interpreter, are privileged and the interpreter may not disclose them unless there was no reasonable expectation of confidentiality.[27]

2. Procedures at Trial

The interpreter is sworn[28] and positioned beside the person for whom he is translating.[29] The interpreting procedures to be used at trial are enumerated in superior court standards[30] and in *Commonwealth v. Festa.*[31] *Festa's* requirements, in summary, are that: (1) all interpretation should be literal, with no editing,[32] extraneous conversations, or supplementary remarks; if there are any such remarks, they must be translated for the court and counsel; (2) counsel should address the witness in the second person and not address the interpreter; and the interpreter should translate in the first person, as if the witness; and (3) if any jurors speak the witness's language, they should be instructed that the English translation is the only evidence, not their own understanding of the foreign language; and neither party has the right to have that juror excused, but the judge has the discretion to do so. Additionally, one commentator has advised that jurors be informed in advance if a witness or defendant who will use a translator nevertheless speaks some English, to avoid any adverse inference that he is hiding behind a purported language barrier.[33]

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[26] G.L. c. 221, § 92A.

[27] G.L. c. 221C, § 4(c). Regarding hearing-impaired individuals, G.L. c. 221, § 92A creates a privilege that bars the interpreter from divulging confidential communications that he facilitated.

[28] G.L. c. 221C, § 4(a).

[29] Rules of Conduct for Interpreters (Standards), Superior Court Department (Aug. 25, 1988).

[30] Rules of Conduct for Interpreters (Standards), Superior Court Department (Aug. 25, 1988).

[31] 369 Mass. 419, 429–30 (1976)

[32] *See also* United States v. Torres, 793 F.2d 436, 439–40 (1st Cir. 1986), *cert. denied,* 479 U.S. 889 (1986) (judge's order that interpreter translate only questions by pro se defendant, not his statements, was error but harmless).

[33] SMITH, CRIMINAL PRACTICE AND PROCEDURE § 2441 (30 Mass. Practice Series 2d ed. 1983).

An interpreter may be removed for grounds listed in G.L. c. 221C, § 5. If two or more parties require an interpreter in the same language, a single interpreter should be used.[33.5]

§ 29.2 MAKING A RECORD FOR APPELLATE REVIEW

§ 29.2A. ENSURING A COMPLETE TRANSCRIPT

As noted elsewhere in this chapter, virtually all criminal hearings in both district and superior court are now recorded either on tape or stenographically, as required by statute.[33.7] The court has a further obligation to ensure an accurate and complete record,[34] and counsel is required to remind the court of its obligation if it fails to do so.[35] There are very few occasions when substantive events should be off the record. Bench conferences should be recorded and in a jury-waived trial should not be held.[36] Under district court standards, lobby conferences are not to be held unless absolutely necessary, but if held a statement should be included on the record regarding their contents.[37]

[33.5] Commonwealth v. Esteves, 46 Mass. App. Ct. 339, 345, *rev'd on other grounds,* 429 Mass. 636 (1999).

[33.7] When no transcript of a hearing exists, the judge's findings of fact against the defendant are conclusive if not shown by the defendant to be erroneous. Commonwealth v. Head, 49 Mass. App. Ct. 492, 492-493 (2000).

[34] ABA Standards for Criminal Justice: Special Functions of the Trial Judge, § 6-1.6 (2d ed. 1980). The S.J.C. referred to the Judicial Conduct Commission to consider as possible violations of S.J.C. Rule 3:09, Canons 1, 2(A), and 3(A) a judge's alleged intentional failures to record courtroom proceedings electronically. In the Matter of Boston Mun. Ct. Dep't of the Trial Ct., No. SJC-OE-085 (Feb. 14, 1991).There are instances when the judge and the clerk will forget to turn on the tape recorder, or for other reasons the record will be incomplete. *See infra* § 45.2C (discussing reconstruction and assembly of record where lack of transcript).

[35] The Appeals Court has noted that if the judge fails in her responsibility to put on the record rulings on proposed jury instructions, counsel has the responsibility to "respectfully remind" the judge of its obligation. Commonwealth v. Adams, 34 Mass. App. Ct. 516, n.3 (1993). *See also* Commonwealth v. Boyajian, 68 Mass. App. Ct. 866 (2007) (it is the responsibility of the defendant as the appealing party to provide an adequate record for review); Commonwealth v. Melo, 67 Mass. App. Ct. 71 (2006); Commonwealth v. Lampron, 65 Mass. App. Ct. 340 (2005); United States v. Del Rosario, 388 F.3d 1 (2004); Commonwealth v. Robicheau, 421 Mass. 176 (1995).

[36] Commonwealth v. Rosenfield, 20 Mass. App. Ct. 125, 126 n.1 (1985); Commonwealth v. Boyajian, 68 Mass. App. Ct. 866 (2007).

[37] Standards of Judicial Practice: Trials and Probable Cause Hearings, Standard 2:00 (District Court Administrative Office, Nov. 1981). *See also* Commonwealth v. Serino, 436 Mass. 408, 412 & n.2 (2002) (on defendant's appeal, Commonwealth may not rely on suggestion that judge made necessary ruling at unrecorded lobby conference); Commonwealth v. Fanelli, 412 Mass. 497, 500–01 (1992) (regarding plea bargaining lobby conference, the "better practice" is to record lobby conferences and to provide a copy of the recording to defendant on request).

§ 29.2B. PRESERVING ERRORS FOR APPEAL

Except in the first tier of the district court from which there is no appeal of law, counsel must always be conscious of "making a record" — that is, preserving all appellate issues by:

1. Meeting all procedural deadlines;
2. Making an offer of proof whenever evidence is excluded;[37.3]
3. Making timely objections or motions to strike, stating all grounds;[37.5]

[37.3] Commonwealth v. Blake, 409 Mass. 146, 158–159 (1991); Commonwealth v. Campbell, 51 Mass. App. Ct. 479, 481-482 (2001). If the judge refuses to let defense counsel approach the bench, an offer of proof is rendered unnecessary. *See* Commonwealth v. Emence, 47 Mass. App. Ct. 299, 303 n.2 (1999); Commonwealth v. Adderley, 36 Mass. App. Ct. 918, 920 (1994). If the content of the refused offer of proof is critical to the defendant's claim of error, she may set out in a postconviction motion what her offer of proof would have been if the judge had received it. *See* Commonwealth v. Stockhammer, 409 Mass. 867, 874, 876 n.4 (1991). If the refusal to let counsel approach the bench bars the statement of a defense objection, placement of the objection on the record at the first opportunity thereafter preserves the issue for appellate review. Commonwealth v. Buzzell, 53 Mass. App. Ct. 362, 369-370 (2001).

Marking an excluded document for identification is an offer of proof of its contents. Commonwealth v. O'Neil, 51 Mass. App. Ct. 170, 177 n.7 (2001). An item offered in evidence by the defense and excluded by the judge should be marked for identification so that it may be included in the record on appeal, and the judge should not refuse to allow the item to be so marked. Commonwealth v. Lawson, 425 Mass. 528, 532 n.7 (1997). If the judge denies defense counsel's request to have an excluded item marked for identification, and the item relates to an issue to be presented on the defendant's appeal, appellate counsel should bring a motion in the appellate court pursuant to Mass. R.A.P. 8(e) to have it made part of the record on appeal. *See ibid.*

[37.5] A "general objection" (that is, an objection without grounds specified) is sufficient to preserve an issue for appellate review if it is clear on the record when the objection is made that the ground for exclusion is obvious. Commonwealth v. Cancel, 394 Mass. 567, 573 (1985). *See also* Commonwealth v. Martin, 417 Mass. 187, 190–191 & 190 n.2 (1994); United States v. Del Rosario, 388 F.3d 1 (2004); Commonwealth v. Melo, 67 Mass. App. Ct. 71 (2006);Commonwealth v. Boyajian, 68 Mass. App. Ct. 866 (2007). Mass. R. Crim. P. 22 permits but does not require a party to state the grounds for her objection, but an objection may not be raised on a specific ground and argued on appeal on a different ground. Commonwealth v. Rivera, 425 Mass. 633, 636–637 (1997). An objection or motion to strike need not be a "model of clarity" so long as it calls the judge's attention to the claimed error. Commonwealth v. Jones, 45 Mass. App. Ct. 254, 258 (1998). *See also* Commonwealth v. Morin, 52 Mass. App. Ct. 780, 783-784 n.3 (2001); Commonwealth v. Monteiro, 51 Mass. App. Ct. 552, 559-560 (2001); Commonwealth v. Charles, 47 Mass. App. Ct. 191, 193 (1999); Commonwealth v. Gee, 36 Mass. App. Ct. 154, 159 (1994); Commonwealth v. Jackson, 23 Mass. App. Ct. 975, 975 (1987).

The defendant does not waive her objection, after it has been overruled, by cross-examining Commonwealth witnesses about its subject matter. Commonwealth v. Lara, 39 Mass. App. Ct. 546, 550 (1995); Commonwealth v. King, 34 Mass. App. Ct. 466, 471–472 (1993). Neither does the defendant waive his objection to the admission

of particular evidence by introducing it before the jury himself after the judge has ruled it admissible, *see* Commonwealth v. Fallon, 423 Mass. 92, 95–97 (1996), or by participating with the judge in its redaction, Commonwealth v. Semedo, 422 Mass. 716, 728 (1996). The absence of a "ritualistic objection" may be excused on appeal when it is clear from the record that the judge was apprised of the ruling sought by defense counsel and ruled to the contrary. Commonwealth v. Choice, 47 Mass. App. Ct. 907, 908 (1999). *See also* Commonwealth v. Matos, 394 Mass. 563, 565 (1985) (penalizing defendant for absence of formal objection, where his request for specific instruction was brought to judge's attention, "would exalt form over substance"); Commonwealth v. Huan Lieu, 50 Mass. App. Ct. 162, 165 n.3 (2000); Commonwealth v. Kruah, 47 Mass. App. Ct. 341, 345 (1999) (opposition to admission of evidence at sidebar conference); Commonwealth v. Almeida, 34 Mass. App. Ct. 901, 902 n.2 (1993) (same). Conversely, an objection by defense counsel that is explicitly "for the record" and does not appear to be seriously meant is treated by the appellate court as if it were no objection at all. *See* Commonwealth v. Olszewski, 416 Mass. 707, 722 (1993), *cert. denied*, 513 U.S. 835 (1994); Commonwealth v. MacKenzie, 413 Mass. 498, 509 (1992).

An objection need not be repeated when the judge's ruling would obviously be the same. Commonwealth v. Connolly, 49 Mass. App. Ct. 424, 426 n.2 (2000); Commonwealth v. Rubio, 27 Mass. App. Ct. 506, 511 n.4 (1989); Commonwealth v. Liberty, 27 Mass. App. Ct. 1, 7 (1989). When the judge has ruled, erroneously, on the defendant's objection that inadmissible evidence is admissible for a limited purpose, the defendant does not need to repeat her objection to preserve her claim of error, Commonwealth v. Campbell, 37 Mass. App. Ct. 960, 963 (1974), or request a limiting instruction, Commonwealth v. Cruz, 53 Mass. App. Ct. 393, 406 n.15 (2001). *See also* Commonwealth v. Cokonougher, 32 Mass. App. Ct. 54, 60–61 (1992) (error in admission of evidence not rendered harmless by judge's limiting instruction); Commonwealth v. Bond, 17 Mass. App. Ct. 396, 400 (1984) (same).

A codefendant's objection and motion to strike may not preserve the defendant's rights. *See* Commonwealth v. Villanueva, 47 Mass. App. Ct. 905, 907 (1999). *But see* Commonwealth v. Claudio, 418 Mass. 103, 111–112 n.6 (1994) (when prosecutor objected to significant omission from judge's charge, error was preserved for defendant on appeal despite absence of defense objection); Commonwealth v. Huan Lieu, 50 Mass. App. Ct. 162, 165 & n.3 (2000) (co-defendant's inquiry of judge as to whether particular instruction was given preserved issue for defendant who did not object).

When a Commonwealth witness gives a non-responsive and inadmissible answer to an *unobjectionable* question, defense counsel's objection must be followed by a motion to strike to "perfect" the objection, although the appellate court may treat the issue as preserved if the judge overruled the objection. Commonwealth v. Quincy Q., 434 Mass. 859, 873 n.19 (2001); Commonwealth v. Conroy, 396 Mass. 266, 267 & n.1 (1985). A motion to strike following a Commonwealth witness's answer to an *objectionable* question to which defense counsel made no objection is too late to preserve the defendant's rights, but the judge has discretion to grant it. *See* Commonwealth v. Phoenix, 409 Mass. 408, 415 & n.3 (1991). Therefore, when defense counsel belatedly recognizes the impropriety, he should move to strike all the objectionable questions and answers it comprised. *See* Commonwealth v. Pagano, 47 Mass. App. Ct. 55, 59 (1999).

4. Whenever possible, including in the grounds for objections both federal constitutional provisions (a prerequisite to federal habeas corpus review) and state constitutional provisions (which are often broader than federal constitutional interpretations);[38]

5. Obtaining a ruling that a single objection, or a motion in limine, be deemed a continuing objection so as to obviate the need for renewing objections;[39] or renewing the objection every time the evidence is offered. A motion in limine seeking a pretrial evidentiary ruling presents a trap for the unwary. Its denial prior to trial does *not* preserve a defendant's rights with regard to the evidence sought to be excluded, *unless* a defense objection to the evidence is stated *at trial*, when the evidence is introduced before the jury.[40];

6. Ensuring that evidence which is admissible for a limited purpose is labeled as such, with the jury so instructed;[40.3]

7. Moving for a required finding of not guilty, both when the prosecution rests and when the defense rests;[40.4]

8. Exercising caution in cross-examination when the prosecutor's direct examination has omitted significant evidence;[40.5]

Appellate counsel should never concede the non-preservation of an issue which was at least arguably preserved at trial by trial counsel. *See* Commonwealth v. Wilson, 49 Mass. App. Ct. 429, 433-434 (2000).

[38] *See* Commonwealth v. Fowler, 431 Mass. 30, 41 n.20 (2000). A state constitutional issue should be raised separately from the federal claim at both the trial court and appellate level. Commonwealth v. Oakes, 407 Mass. 92, 98 (1990); Commonwealth v. Molino, 411 Mass. 149, 152 n.3 (1991).

[39] Commonwealth v. Schatvet, 23 Mass. App. Ct. 130, 133 (1986). *See also* Commonwealth v. Fleury, 417 Mass. 810, 811 n.1 (1994); Commonwealth v. Urena, 42 Mass. App. Ct. 20, 21 n.1 (1997). But defense counsel must be precise as to what her "continuing objection" covers. *See* Commonwealth v. Bradshaw, 385 Mass. 244, 268 & 268–269 n.8 (1982).

[40] Commonwealth v. Whelton, 428 Mass. 24, 25–26 (1998). *See also* Commonwealth v. Marshall, 434 Mass. 358, 367-368 (2001) objection renewed after voir dire of witness whose testimony motion in limine sought to exclude preserved issue of admission of witness's testimony for appellate review); Commonwealth v. Botticelli, 51 Mass. App. Ct. 802, 807 (2001) (motion in limine to admit testimony must be followed by calling of witness at trial and objecting to judge's exclusion of testimony to preserve issue for appeal); Commonwealth v. Hardy, 47 Mass. App. Ct. 679, 681 (1999); Commonwealth v. Grenier, 45 Mass. App. Ct. 58, 59, 62 (1998). In *Whelton, supra,* the S.J.C. distinguished a motion in limine from "a motion to suppress evidence on constitutional grounds, [which by contrast] is reviewable without further objection at trial."

[40.3] *See* Commonwealth v. White, 48 Mass. App. Ct. 658, 660 n.4 (2000).

[40.4] If more than one theory of guilt is being presented to the jury, the motion for required finding should address each theory specifically. A "generally phrased" required finding motion does not preserve for review the sufficiency of the evidence as to a particular theory of liability. *See* Commonwealth v. Berry, 431 Mass. 326, 330–332 (2000).

[40.5] *See* Commonwealth v. Peters, 429 Mass. 22, 32 (1999).

9. Describing on the record all rulings or stipulations that were made off the record;[40.6]

10. Describing on the record any nonverbal events that may be significant;[40.7]

11. Requesting any alternative, lesser relief that may be required for appellate success, such as cautionary instructions;[40.8]

12. Pursuant to Mass. R. Crim. P. 24(b), filing a written request for particular jury instructions at the close of the evidence, and *prior* to jury deliberation objecting to both the failure to give requested instructions and the actual instructions given, stating grounds;[40.9]

13. Correcting any misconceptions by the court;[41] and

14. Anticipating and researching all potential evidentiary issues before trial, so as to be able to mold the trial in the most favorable posture for appeal.[42]

If a desirable plea bargain is available, counsel should consider utilizing methods like the stipulated trial which unlike a guilty plea, do not waive appellate review of pretrial matters.[43]

§ 29.3 TAPE RECORDINGS OF COURT PROCEEDINGS

District Court Special Rule 211 and ancillary rules[44] replace previous court rules[45] governing electronic records of court proceedings. Defense counsel should request court personnel to make sure that the recording equipment is working.[45.5]

[40.6] *See* Commonwealth v. Lebon, 37 Mass. App. Ct. 705, 706 n.1(1994) (agreed statement of what was said at unrecorded lobby conference).

[40.7] *See* Commonwealth v. Vann Long, 419 Mass. 798, 805 & n.8 (1995) (defense counsel's statement as to number of ethnic minority groups in venire); Commonwealth v. Johnson, 417 Mass. 498, 501 n.3 (1994) (defense counsel's statement that child witnesses will have their backs to defendants while testifying); Commonwealth v. Hoppin, 387 Mass. 25, 28–29 & 29 n.4 (1982) (defense counsel described prosecutor's display to jury of rawhide which had not been introduced in evidence); Commonwealth v. Springer, 49 Mass. App. Ct. 469, 478 (2000) (record should reflect races of individuals when germane to issue raised on defendant's appeal).

[40.8] *See* Commonwealth v. Gallagher, 408 Mass. 510, 518 & n.7 (1990).

[40.9] *See infra* § 36.3A.

[41] Commonwealth v. Manrique, 31 Mass. App. Ct. 597, 601 (1991) (defense counsel obliged to correct judge's inaccurate assumption that the prosecution had already provided informant's whereabouts); United States v. Del Rosario, 388 F.3d 1 (2004) (defendant bound by trial transcript after not requesting the court to correct an alledged missing word, "not").

[42] *See also* CPCS, Performance Guidelines Governing Representation of Indigents in Criminal Cases, Guideline 6.1(e) (counsel's obligation to make a record and preserve appellate points).

[43] *See infra* § 37.8A.

[44] *See* B.M.C. Special R. 308, identical in language to Dist. Ct. Special R. 211; Dist. Ct. Admin. Reg. No. 1-88; Super. Ct. Standing Order No. 2-87 (Dec. 11, 1987).

[45] Formerly, such recordings were governed by Dist. Ct. Supp. R. Crim. P. 9, Rule 15 of the Rules of the B.M.C. Sitting for Criminal Business, Dist./Mun. Cts.

§ 29.3A. WHEN TAPE RECORDINGS ARE USED

Almost all district courts now routinely tape record the proceedings. It is worth noting that the lavalier microphones designed for counsel in the district court have a button that shuts off the microphone, permitting counsel to confer with his client or others without recording the conversation. Also, counsel should ensure that the taped record will be easily identifiable, by noting in her file the tape number, the counter numbers at the beginning and end of the hearing, and the courtroom session at which the hearing was held.

1. As the Official Record

Rule 211 requires all district court proceedings including arraignments to be electronically recorded, subject to limited exceptions.[46] Superior court presiding justices are authorized to use tape recording devices when a court reporter is unavailable.[47]

2. Private Recordings

An attorney has a right, on request, to electronically record any proceedings that are not being recorded by a court reporter or court tape recorder.[48] Covert recording by any person is prohibited, but news reporters may record the proceedings under the terms of S.J.C. Rule 1:19.[49]

§ 29.3B. OBTAINING PREVIOUSLY RECORDED TAPES

Suppl. R. Civ. P. 114, and Dist. Ct. Admin. Reg. No. 6-80, all either abolished or incorporating by reference the new rules.

[45.5] Commonwealth v. Elliffe, 47 Mass. App. Ct. 580, 581 n.2 (1999); Smith v. Jones, 67 Mass. App. Ct. 129,134 (2006).

[46] Dist. Ct. Special R. 211(A)(1). The exceptions provide that tape recording need not take place if the proceeding is a magistrate's hearing, is being recorded by an appointed court reporter, or is purely administrative (such as the call of the list).

Additionally, in a jury-of-six session the defendant is entitled to a stenographer on a request made forty-eight hours in advance, unless unavailable. G.L. c. 218, § 27A(h).

[47] Super. Ct. Standing Order No. 2-87.

[48] Dist. Ct. Special R. 211(B)(2). If there is an official recording, a motion to privately record is discretionary with the judge. *See also* Super. Ct. R. 17; Commonwealth v. Britt, 362 Mass. 325 (1972), *aff*'d sub nom. Britt v. McKenney, 529 F.2d 44, 46 (1st Cir. 1976) (denial of motion to tape witnesses is ordinarily abuse of discretion); United States v. Yonkers Bd. of Educ., 747 F.2d 111 (2d Cir. 1984) (no first amendment right to privately record).

[49] See http://www.mass.gov/courts/sjc/media/media-reg-rule119.html;

Super. Ct. R. 17; Dist. Ct. Special R. 211(B)(1), (3).

Any tapes that will be needed — such as tapes of a probable-cause hearing where there was a bind-over — should be ordered immediately so that they are available for preparation and impeachment purposes.[50]

There is a right of public access to cassette copies of any proceeding that was open to the public and has not been sealed or impounded;[51] any person may order such a cassette by submitting the cassette copy order form to the relevant clerk's office. If the proceeding was closed, sealed, or impounded, the tape recording can be obtained only by court order, unless the request is by a party who certifies that the tape will be used solely for appeal or determining whether to claim an appeal.[52] If the proceeding is pending appeal, anyone requesting a cassette copy must certify that he has notified all other parties of his request.[53]

Cassette copies now cost $50.50 plus postage per ninety minutes of recording or part thereof. However, CPCS-represented parties automatically qualify for cassette copies without fee and need not utilize the indigent expense procedure of G.L. c. 261, § 27A-G.[54]

District court tape recordings must be retained for at least two and a half years; superior court recordings for at least six years.[55] When a party believes that the tape may be needed beyond that period, he should bring a motion for that purpose.[56]

§ 29.3C. USING PREVIOUSLY RECORDED TAPES

1. At Trial

The defendant is entitled to use a district court tape recording for impeachment or other permissible purposes. In *Commonwealth v. Gordon,*[57] the Supreme Judicial Court concluded that it would be error to exclude an audio recording simply because it was not presented in traditional transcript form and enumerated the following prerequisites for admission of the tape: (1) the testimony must be otherwise admissible;

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[50] *See* CPCS, Performance Guidelines Governing Representation of Indigents in Criminal Cases, Guidelines 3.2(e) and (g) (probable-cause hearing tapes), and 6.1(a)(4) (obtain transcripts of prior proceedings). *Cf.* Commonwealth v. Duhamel, 391 Mass. 841, 843–46 (1984) (no ineffective assistance from failure to transcribe tape, since lawyer could assume tape would be admissible and since little impeachment value in this case).

[51] Dist. Ct. Special R. 211(A)(5) (a); Super. Ct. Standing Order 2-87, ¶ 6.

[52] Dist. Ct. Special R. 211(A)(5) (b). However, Super. Ct. Standing Order 2-87, ¶ 7, does not adopt this provision, stating instead that in such cases, the recording shall be deemed impounded and "shall be subject to the provisions of law governing such closed proceedings, as well as to any additional restrictions with regard to its use which may be prescribed by the Justice who presides over the proceeding."

[53] Dist. Ct. Special R. 211(A)(5)(c); Super. Ct. Standing Order 2-87, ¶ 6.

[54] Dist. Ct. Special R. 211(A)(5)(c). Note, however, that for superior court tapes, Standing Order 2-87 appears to require application for indigent expenses under G.L. c. 261, §§ 27A-G.

[55] Dist. Ct. Special R. 211(A)(4); Super. Ct. Standing Order 2-87, ¶ 10.

[56] Dist. Ct. Special R. 211(A)(4).

[57] 389 Mass. 351, 355–56 (1983).

(2) the recording must be properly authenticated as the official sound recording of district court proceedings, as detailed in the margin;[58] (3) the judge may require the tape be edited to include only relevant material, subject to the opponent's right to introduce appropriate material under the doctrine of "verbal completeness";[59] (4) the proponent has the burden of bringing an adequate, audible, and coherent recording;[60] (5) the judge has discretion to allow a properly authenticated transcript to be provided to the jury as an aid to understanding the recording; (6) a party is not obligated to prove the contents of prior testimony through the recording but may use other means including competent witness testimony; and (7) the proponent has the duty of ensuring proper equipment for playback is available in the courtroom.

As noted above, a defendant may also use a transcript or witness as evidence of the testimony in the prior proceeding.[61] The transcript may be used as evidence of the testimony given if it is certified as accurate by the court or the transcriber, or stipulated to by the parties.[62]

2. For Appeal

Use of a tape recording for an appeal of law is governed by Mass. R. App. P. 8(b)(3), which should be consulted. Portions of that rule provide that when he enters

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[58] *See* G.L. c. 218, § 27A(h) (district court recording admissible if certified by the district court administrative justice or his designee as accurate electronic reproduction). *Cf.* G.L. c 221, § 91B (admissibility of stenographer's transcript). For authentication of tape recordings generally, *see* Commonwealth v. Allen, 22 Mass. App. Ct. 413, 421 n.9 (1986).

[59] Counsel should index the tape in advance so that the admissible portion is easily found and segregable. *See* Commonwealth v. Favorito, 9 Mass. App. Ct. 138, 139–40 (1980), in which the court upheld the exclusion of notebooks and tapes because counsel had not segregated the admissible portion.

[60] *See also* Commonwealth v. Vaden, 373 Mass. 397, 400–01 (1977) (tape must substantially reproduce the prior testimony in all material particulars); Commonwealth v. Mustone, 353 Mass. 490, 494 (1968) (same). *But see* Commonwealth v. Allen, 22 Mass. App. Ct. 413, 422 (1986), which found error in the court's exclusion of an incomplete transcript of a 911 tape, relying on precedent that favored admission because jury common sense could be trusted to evaluate the value of an inaudible or incomplete tape. The court cited with approval the Eighth Circuit standard: "The task of the trial court, in determining whether to admit tape recordings into evidence which contain [missing or] inaudible portions, is to assess whether the . . . portions are 'so substantial, in view of the purpose for which the tapes are offered, as to render the recording as a whole untrustworthy.' " *Allen, supra,* 22 Mass. App. Ct. at 422.

[61] Commonwealth v. Gordon, 389 Mass. 351, 356 (1983). *See also* Commonwealth v. Duhamel, 391 Mass. 841, 844 (1984) (witness may testify instead of tape); Commonwealth v. Rodriguez, 378 Mass. 296, 309 (1979) (defendant entitled to present stenographer to read notes of pretrial hearing, rather than be forced to rely on inherently less credible testimony of counsel's law student); Commonwealth v. Watson, 377 Mass. 814, 834 (1979) (best evidence rule does not apply to tape recordings, so witness testimony as to what he overheard is admissible); Commonwealth v. DiPietro, 373 Mass. 369 (1977); Commonwealth v. Mustone, 353 Mass. 490, 494 (1968).

[62] G.L. c. 218, § 27A(h).

the appeal, the appellant must also order the cassette copy, and within fifteen days of receipt file with the lower court clerk a document which designates those parts of the tape that will be transcribed. Within fifteen days thereafter the Commonwealth may designate additional portions. Jury impanelment will not be included in the transcript unless specifically requested. The Commonwealth pays for the original typed transcript and copies for the appellate court; the defendant arranges and pays for his own copy unless indigent.[63]

Frequently district court transcripts prepared from tape recordings are "riddled with gaps and inaudible segments."[63.1] When sidebar conferences are omitted[63.3] under Mass. R. App. P. 8(b)(3) or (c) and (e) the defendant as appellant has the burden of reconstructing the omitted portions[63.4]. in order to demonstrate that the errors she claims on appeal were saved for appellate review at trial.[63.5] In *Commonwealth v. Woody*,[63.7] the most extensive appellate discussion of the defendant-appellant's burden to fill gaps in the record, the Supreme Judicial Court disapproved the Appeals Court's suggestion in the same case that the Commonwealth as appellee had some burden to initiate proceedings to settle the record.[63.8] The court in *Woody* did, however, excuse the defendant from having to fill gaps in the record which he considers not material to the issues he raises on appeal.[63.9]

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[63] *See also* Commonwealth v. Swain, 21 Mass. App. Ct. 949, 950–51 (1986) (rescript) (nonindigent defendant pays for copy of transcript).

[63.1] Commonwealth v. Robicheau, 421 Mass. 176, 184 n.7 (1995). *See also* Commonwealth v. O'Connor, 420 Mass. 630, 632 n.3 (1995) (record in "deplorable" condition with "[c]ritical portions of the transcript ... transcribed as inaudible"); Commonwealth v. Caldwell, 45 Mass. App. Ct. 42, 45 (1998) ("transcript of the colloquy with [a] juror ... is unfortunately incomplete, much of the conversation apparently not having been recorded").

[63.3] *See* Commonwealth v. McCormick, 48 Mass. App. Ct. 106, 108 (1999) ("numerous sidebar conferences during the trial ... were not transcribed"); Commonwealth v. Boyajian, 68 Mass. App. Ct. 866, 868 n.1 (2007) (sidebar conference upon which defendant relied was not transcribed).

[63.4] *See* Commonwealth v. Dolliver, 52 Mass. App. Ct. 278, 280 n.1 (2001) (description of process of supplementation of defective district court record).

[63.5] Commonwealth v. Woods, 419 Mass. 366, 369–372 (1995); Commonwealth v. Robicheau, 421 Mass. 176, 184 n.7 (1995); Commonwealth v. McCormick, 48 Mass. App. Ct. 106, 108 n.3 (1999). *But see* Commonwealth v. Carnell, 53 Mass. App. Ct. 356, 359 (2001) (where reasonable to infer that judge was alerted to defendant's objection at inaudible bench conference, objection adequately preserved for appellate review); Commonwealth v. Jackson, 45 Mass. App. Ct. 666, 668–669 & 669 n.3 (1998) (defendant did not have to reconstruct judge's rulings which were "either inaudible or not electronically recorded" where transcript showed what basis of judge's rulings was).

[63.7] 429 Mass. 95 (1999).

[63.8] Commonwealth v. Woody, 429 Mass. 95, 96–97 & 96 n.1 (1999), *disapproving S.C.*, 45 Mass. App. Ct. 906 (1998).

[63.9] Commonwealth v. Woody, 429 Mass. 95, 98–99 (1999). This holding of the *Woody* case may curtail unfairness in the application of the rule placing on the defendant-appellant the burden to fill gaps in the record of the sort evidenced by the pre-*Woody* decision of the Appeals Court in Commonwealth v. Caldwell, 45 Mass.

§ 29.4 STENOGRAPHIC RECORD OF THE PROCEEDINGS

§ 29.4A. AS OFFICIAL RECORD

In superior court criminal proceedings are recorded stenographically by an official court reporter.[64] In the jury-of-six session the defendant is entitled to a stenographer upon a request made forty-eight hours in advance unless a stenographer is unavailable, in which case the proceeding must be tape recorded.[65] Failure to appropriate sufficient state funds is one cognizable basis for unavailability.[66]

The reporter's notes may be destroyed after six years, unless a transcript has been ordered and not completed, or the court orders otherwise.[67]

§ 29.4B. BY DEFENDANT'S STENOGRAPHER

If a court-appointed stenographer is not present, the defendant is entitled to have her own stenographer record the proceedings at her own expense.[68] (*See also infra* § 29.5 regarding an indigent's right to a stenographer at Commonwealth expense). The stenographer will be sworn and provided a suitable place from which to record the proceedings. However, the record will not be an official record for appellate purposes unless the stenographer is appointed the official court reporter by the judge.[69]

§ 29.4C. OBTAINING AN OFFICIAL TRANSCRIPT

App. Ct. 42 (1998). In *Caldwell, supra* at 46, the defendant's constitutional right to be present at a colloquy between the judge and a deliberating juror resulting in the juror's removal was violated, putting the burden on the Commonwealth to show affirmatively that the constitutional error was harmless beyond a reasonable doubt. However, because the transcript of the judge's colloquy with the juror was incomplete, and the defendant did not meet his "burden" to complete the record on appeal, the Appeals Court affirmed his conviction, ruling that, by failing to fill the gap in the record of the colloquy, the defendant had not shown that the judge did not conduct an inquiry of the juror sufficient to establish that the defendant's unconstitutional absence from the colloquy was not prejudicial to the defendant, *id.* at 46–48, in effect relieving the Commonwealth of its burden to prove harmlessness beyond a reasonable doubt and placing on the defendant the burden to fill a gap in the record in order to prove a double negative.

[64] *See* G.L. c. 221, § 82 (stenographers appointed as superior court business shall require).

[65] G.L. c. 218, § 27A(h); Standing Orders of the Boston Municipal Court, Order 1-83.

[66] Commonwealth v. Fitzpatrick, 16 Mass. App. Ct. 99, 100–103 (1983).

[67] S.J.C. Rule 1:12.

[68] G.L. c. 221, § 91B; Commonwealth v. Shea, 356 Mass. 358, 360–61 (1969) (reversible error to bar defendant's stenographer from recording proceedings, because entitlement not subject to court's discretion). *See also* Connaughton v. District Court, 371 Mass. 301, 302 (1976).

[69] McCarthy v. O'Connor, 398 Mass. 193, 199 (1986).

Indigents may obtain certain transcripts at Commonwealth expense, as detailed *infra* at § 29.5. For nonindigents, *if the transcript is needed for appeal,* the trial court clerk orders the transcript, with a nonindigent defendant paying the cost of a photocopy.[70] Inordinate delay in producing the trial transcript may violate due process if it was a deliberate blocking of appellate access or if coupled with prejudice.[71] Appellate counsel faced with such delay are advised in *Commonwealth v. Fisher* [71.3] to take steps to deal with the problem, by reporting it to the clerk of the Appeals Court[71.5] or by bringing an appropriate motion before a single justice of the Appeals Court[71.7] or in the trial court.[71.9] The remedies for dealing with a lost or unavailable transcript are addressed *infra* at § 45.2C. *For other purposes,* any defendant is entitled to obtain a transcript at her own expense.[72] If the defendant will require daily transcripts, the court should be notified in advance.[73]

§ 29.4D. USING A TRANSCRIPT

A transcript is admissible as evidence of testimony given if proof of that testimony would otherwise be competent, and if the transcript is verified by a certificate from the stenographer.[74]

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[70] Mass. R. App. P. 8(b)(2), (4). *See also* Commonwealth v. Swain, 21 Mass. App. Ct. 949, 950–51 (1986) (expenses for transcript preparation need not be reimbursed to nonindigent defendant).

[71] Commonwealth v. Duhamel, 391 Mass. 841, 846–47 (1984) (citing Commonwealth v. Swenson, 368 Mass. 268, 279–80 (1975), and Doescher v. Estelle, 454 F. Supp. 943, 946 (N.D. Tex. 1978)); Williams, Petitioner, 378 Mass. 623 (1979). In *Duhamel,* a one-year delay for a two-day trial was found deplorable but not violative since no prejudice inhered in the defendant serving a sentence he would have had to serve anyway. *See also* Commonwealth v. Santos, 41 Mass. App. Ct. 621 (1996) (delay of 49 months held not to violate due process). *See* more detailed discussion *supra* at § 23.2F (appellate delay and speedy trial).

[71.3] 54 Mass. App. Ct. 41 (2002).

[71.5] Commonwealth v. Fisher, 54 Mass. App. Ct. 41, 48 (2002) ("Often a clerk to clerk … communication may produce the desired expedition"), quoting Zatsky v. Zatsky, 36 Mass. App. Ct. 7, 12 (1994).

[71.7] Zatsky v. Zatsky, 36 Mass. App. Ct. 7, 13 (1994), cited in Commonwealth v. Fisher, 54 Mass. App. Ct. 41, 48 & n. 8 (2002).

[71.9] Commonwealth v. Fisher, 54 Mass. App. Ct. 41, 48 n.8 (2002).

[72] G.L. c. 218, § 27A(h) (jury-of-six session); G.L. c. 221, § 88, entitling any party to purchase transcript at specified stenographer's fees.

[73] Commonwealth v. DeStefano, 16 Mass. App. Ct. 208, 221 (1983).

[74] G.L. c. 233, § 80 (official court reporter); G.L. c. 221, § 91B (defendant's stenographer). *Cf.* Commonwealth v. DiPietro, 373 Mass. 369 (1977) (where transcript not admissible under former statute, stenographer could identify her transcript of probable-cause hearing as a record of her past recollection recorded); Commonwealth v. Mustone, 353 Mass. 490, 494–95 (1968) (although defendant's stenographer not sworn, transcript may be admitted under exception to hearsay rule).

§ 29.5 INDIGENT'S RIGHT TO A STENOGRAPHER OR TRANSCRIPT

As detailed above, by statute all defendants are entitled to have almost all court proceedings officially recorded, at least by a tape recorder, and are entitled to themselves tape record any hearing that is not being recorded. When the proceeding has been recorded on tape, an indigent defendant may obtain the cassette copy at Commonwealth expense.[75] But whether a stenographer will be appointed despite the availability of a taping system, or whether a transcript will be provided at Commonwealth expense, depends on the nature of the hearing, as detailed below.[76]

§ 29.5A. STATE-PAID STENOGRAPHER

While indigent defendants have the right to state-funded stenographers in some cases,[77] the Supreme Judicial Court has found no right to a court-appointed stenographer at a probable-cause hearing.[78] In some circumstances the courts may view the availability of tape-recorded cassettes as rendering a stenographer unnecessary, unless the importance of the hearing or the lesser fidelity of a taped transcript is persuasive.[79]

§ 29.5B. TRANSCRIPT FOR APPEAL

[75] CPCS-represented parties automatically qualify for cassette copies without fee and may obtain a fee waiver without utilizing the indigent expense procedure of c. 261, § 27A-G. Dist. Ct. Special R. 211(A)(5)(c).

[76] Blazo v. Superior Court, 366 Mass. 141, 150 (1974) ("the need for a record, or for a record of a given fidelity, varies from case to case"); Commonwealth v. Britt, 362 Mass. 325, 331 (1972), *aff'd sub nom.* Britt v. McKenney, 529 F.2d 44, 46 (1st Cir. 1976).

[77] Apart from the statutory right of all defendants to a stenographer in certain court hearings, addressed *supra* at § 29.4A, a stenographer was found constitutionally required on defendant's motion in Blazo v. Superior Court, 366 Mass. 141, 151 (1974), when the only alternative available to a defendant was bringing a tape recorder of insufficient fidelity.

[78] Commonwealth v. Britt, 362 Mass. 325, 328 (1972).

[79] *See, e.g.,* Commonwealth v. Richards, 369 Mass. 443, 451 (1976) (no error to deny stenographer or transcript since defendants permitted to tape record). While the S.J.C. has recognized that in some cases there will be a need for a record of greater accuracy, it assumed that the future installation of taping systems might solve that problem. Blazo v. Superior Court, 366 Mass. 141, 150, 153–54 (1974). *But see* Commonwealth v. Schatvet, 23 Mass. App. Ct. 130, 131 n.2 (1986) (noting that "the transcript [of a tape recorded hearing] is riddled with 'inaudibles' and the contents of bench conferences are systematically omitted"); CPCS, Performance Guidelines Governing Representation of Indigents in Criminal Cases, Guideline 6.1(4)(3) (counsel should make every attempt to obtain stenographer rather than rely on tape).

The equal protection and due process clauses of the Fourteenth Amendment, and, presumably, analogous state constitutional provisions,[80] require that an indigent defendant be provided free copies of all portions of the transcript that are necessary for direct or collateral appeal;[81] in interpreting what portions are necessary to the appeal, the Supreme Judicial Court has recognized that sometimes a complete transcript is necessary in order to evaluate where potential error lies, while still cautioning counsel to refrain from requesting portions of the transcript (like jury impanelment) that may be irrelevant to the appeal.[82] In any event, under Massachusetts laws, if the defendant qualified for appointed counsel, a complete transcript will be supplied without cost;[83] in other cases where the defendant is currently indigent, he may obtain a transcript by utilizing the statutory procedure for obtaining "normal fees and costs."[84]

§ 29.5C. TRANSCRIPT FOR USE AT TRIAL

If the transcript is needed for other reasons, such as trial preparation or impeachment of trial witnesses, there is no automatic and unconditional right to a transcript. However, a statutory procedure allows an indigent to obtain a transcript if it is "reasonably necessary to assure the applicant as effective a defense . . . as he would

[80] Counsel should cite arts. 11 and 12 of the Minn. Const. Declaration of Rights as well as the federal Fourteenth Amendment in making any constitutional claim to a transcript.

[81] Griffin v. Illinois, 351 U.S. 12, 19 (1956), established that when a defendant must submit a transcript to prosecute his appeal, he has a constitutional right to obtain that transcript without cost, since "there can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." *See also* United States v. MacCollum, 426 U.S. 317 (1976); Mayer v. Chicago, 404 U.S. 189 (1971); Britt v. North Carolina, 404 U.S. 226, 227 & n.1, and cases cited (1971); Williams v. Oklahoma City, 395 U.S. 458 (1969); Gardner v. California, 393 U.S. 367 (1969); Blazo v. Superior Court, 366 Mass. 141, 143 (1974). *Cf.* Charpentier v. Commonwealth, 376 Mass. 80, 88–89 (1978) (right to complete transcript based on former G.L. c. 278, §§ 33A–33H, but counsel should request only portions necessary).

[82] Charpentier v. Commonwealth, 376 Mass. 80, 88 & n.8 (1978) ("frequently, issues simply cannot even be seen — let alone assessed — without reading an accurate transcript"). *See also* Blazo v. Superior Court, 366 Mass. 141, 151–52 & n.20 (1974) (burden is on the state to show that only a portion of the transcript suffices for the appeal (citing Mayer v. Chicago, 404 U.S. 189, 195 (1971)).

Moreover, because the complete transcript is available to nonindigent defendants for a fee, under the equal protection clause an indigent defendant must have an equal right to obtain the complete transcript. Commonwealth v. Britt, 362 Mass. 325, 331 (1972) (citing Roberts v. LaVallee, 389 U.S. 40 (1967)).

[83] Mass. R. App. P. 8(b)(4). According to Rule 8(b)(2), the parties will receive a complete transcript unless the parties identify by stipulation those parts which need not be transcribed.

[84] G.L. c. 261, § 27G. *Cf.* Morales v. Appeals Court, 427 Mass. 1009, 1011 & n.4 (1998) (S.J.C. indicates that indigent defendant is entitled to free copy of transcript of guilty plea hearing for first attempt at challenging plea).

have if he were financially able to pay."[85] And underlying constitutional guarantees of equal protection and due process require a free transcript when needed for an effective defense.[86] The Supreme Court has identified two factors relevant to this determination: (1) the availability of alternative devices that would fulfill the same functions as a transcript and (2) the value of the transcript to the defendant, which should be presumed when the transcripts at issue are of prior proceedings in the same case.[87] "The state's fiscal interest is . . . irrelevant" in this equation.[88]

When an official stenographer has recorded the prior proceedings, it would appear that an indigent must be furnished with a transcript because a wealthier defendant can purchase it.[89] But it is unclear what is required when the proceedings were taped. *Commonwealth v. Britt* [90] found no right to a transcript of a probable-cause hearing, but this was before tape systems existed in the district court and the opinion indicated that the result would be otherwise were the proceedings recorded and available for purchase. Any argument that the availability of free cassette copies is an equivalent substitute for a transcript is belied by the fact that few counsel representing nonindigents neglect to purchase a transcript of prior, relevant evidentiary proceedings, since tapes are cumbersome, inefficient, and of less utility in and out of court.[91]

The Supreme Judicial Court has stated that attorneys seeking a stenographer or transcript "are to act as if they were representing non-indigent clients to whom the expenditures in question were matters of serious consequence" — that is, to "avoid making unnecessary or exorbitant demands."[92]

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[85] G.L. c. 261, § 27C; Commonwealth v. Lockley, 381 Mass. 156 (1980). Note also that the cost of transcribing a deposition is enumerated as an extra fee or cost under § 27A. The procedure for obtaining indigent fees and costs under this statute is addressed *supra* § 8.4B.

[86] Roberts v. LaVallee, 389 U.S. 40 (1967).

[87] Britt v. North Carolina, 404 U.S. 226, 227, 228 (1971). *See also id.* at 234–41 (Douglas, dissenting) (discussion of value of transcript of prior proceedings).

[88] Mayer v. Chicago, 404 U.S. 189, 196–97 (1971) (equal protection requires that the indigent have as effective a defense as a nonindigent).

[89] Commonwealth v. Britt, 362 Mass. 325, 331 (1972) (citing Roberts v. LaVallee, 389 U.S. 40 (1967) (transcript must be furnished when the state makes a transcript of the proceedings available for a fee)).

[90] 362 Mass. 325, 331 (1972).

[91] *See* Britt v. North Carolina, 404 U.S. 226, 230 (1971) (defendant need not be provided with transcript if state proves that equivalent alternative exists). But a tape recording is clearly inferior to a transcript for defense purposes. *See* CPCS, Performance Guidelines Governing Representation of Indigents in Criminal Cases, Guideline 6.1(e)(3) (counsel should make every effort to obtain a stenographer rather than rely on tape recording).

[92] Blazo v. Superior Court, 366 Mass. 141, 153 (1974). *See also* Commonwealth v. Turner, 371 Mass. 803, 814–15 (1977).