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Extensive Amendments to the Massachusetts Rules of Appellate Procedure Effective in 2019

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by Joseph Stanton & Patricia Campbell Malone

Heads Up

The Supreme Judicial Court has approved extensive amendments to the Massachusetts Rules of Appellate Procedure (“Rules”), which become effective on March 1, 2019. This article summarizes by topic the most significant amendments.

Background. The amendments are the product of a four-year study of the Rules conducted by the Appellate Rules Subcommittee (“Subcommittee”) of the Supreme Judicial Court Standing Advisory Committee on Civil and Appellate Procedure, in conjunction with the Standing Advisory Committee on the Rules of Criminal Procedure. The Subcommittee included appellate judges, appellate and trial court clerks, and attorneys with expertise in civil and criminal appeals.

The Subcommittee reviewed the Rules and prepared amendments to: facilitate the just and expeditious resolution of appeals; clarify and simplify filing and formatting requirements; eliminate arcane language and incorporate consistent style and terminology; integrate existing practices and procedures; and

facilitate the implementation of paperless court processes. Valuable public comments were received from the Boston Bar Association and other organizations and attorneys.

Universal Amendments. Global revisions to the Rules include: use of gender-neutral references; removal of provisions rendered obsolete by technological developments and work processes; numbering and collapsing of lengthy freestanding paragraphs to facilitate ease of reference; consistency in the numbering of provisions; revising the Rules' shorter filing deadlines (i.e., non-brief or notice of appeal) to be in increments of 7 days to increase the likelihood that the deadline falls on a business day; and changing all use of "opposition" to "response" to reflect that a nonmoving party may respond to the moving party's request, but not necessarily oppose that request.

Time Period for Filing Notice of Appeal. Amendments to Rule 4 clarify that if multiple post-judgment motions are filed, the time for filing a notice of appeal for all parties begins on the date when the lower court enters the order that disposes of the last remaining motion enumerated in the Rule, and that the filing of a motion under Mass. R. Civ. P. 60(a) to correct a clerical error does not toll the time period.

Assembly of the Record, Timing and Contents. To prevent delay in completing assembly of the record, amendments to Rule 9(a) establish a 21-day deadline for the clerk of the lower court to complete assembly of the record. The time period begins to run from the later of certain occurrences, including either the receipt of the entire transcript, approval of an agreed statement of the record, or a notice that the appellant does not intend to order a transcript. In addition, amended Rule 9(e) identifies in a checklist format the items and information that the lower court clerk must include in the assembly package.

Transcripts. Amendments to Rule 8 were adopted from recommendations made by the Trial Court Working Group on Assembly of the Record, convened by the Chief Justice of the Trial Court to coordinate with the Appellate Rules Subcommittee to modernize and streamline the transcript production processes. Amended Rule 8 is simplified by focusing on an appellant's duty to file with the clerk and serve on all parties within 14 days an order of all relevant proceedings to be transcribed, a statement certifying that no court proceedings are relevant, or a statement certifying that all relevant transcripts are already on file with the lower court. Reference to service of designation (and counter-designation) of parts of the cassette to be transcribed was deleted and amended Rule 8 simply directs an appellee to, if necessary, order the transcript of any additional relevant proceedings within 14 days of the appellant's order. An Administrative Order of the Chief Justice of the Trial Court now governs technical details such as submission of the transcript order form (which depends on the type of proceeding and method by which it was recorded), payment, indigency, and delivery of the electronic transcript.

Docketing the Appeal. In Rule 10, the time period for appellants and cross-appellants in civil cases to docket their appeal was increased from 10 to 14 days and a new provision was added to deem payment or request for waiver timely if mailed with a certificate attesting that the day of mailing was within 14 days of the filer's receipt of the notice of assembly. These changes are intended to provide appellants additional time to docket the appeal, reduce the need for motions to docket appeals late, and obviate the need for parties to physically travel to the courthouse if attempting to docket an appeal on the final day.

Word Count Limit and Proportionally Spaced Font Alternative to Page Limits. One of the most significant amendments to the Rules appears in Rule 20(a)(2). It allows, as does Fed. R. App. P. 32(a)(7), the option for filers to submit documents using a word-count limit and a proportionally spaced font (e.g., Times New Roman) as an alternative to the traditional page limit and monospaced font (e.g., Courier New) requirement. This option is incorporated into each Rule that previously contained a page limit. For example, an appellant or appellee filing a brief in a non-cross appeal could, instead of using

the 50-page limit, use an 11,000-word limit in a proportionally spaced font. When a proportionally spaced font is used, the font size shall be 14 or larger, all margins 1 inch or larger, and the Rule 16(k) certificate must state how compliance with the word limit was ascertained. These amendments are intended to improve documents' readability and to eliminate the considerable time parties sometimes spend using formatting devices solely to comply with the current page limits. Notably, the specific word-count limits differ from the Federal Rules applicable to the various briefs and other filings because adopting the Federal word-count limits would lead to substantially longer filings than currently authorized by the traditional Massachusetts standards. The Rules continue to permit a filer to seek leave to exceed the maximum word-count or page limit, upon a showing of extraordinary reasons.

Filing and Serving Documents. Rule 1(c)'s definition of "[f]irst class mail" was expanded to "[f]irst class mail or its equivalent" to explicitly allow the common practice of using third-party commercial carriers to file documents. For the same reason, Rule 13 was amended to allow electronic service (such as through eFileMA.com or e-mail) with the consent of the party being served. The required contents of a certificate of service were modified to promote consistency with the appellate courts' electronic-filing procedures.

"Inmate Mailbox Rule." The amendments incorporate in all civil and criminal appeals the so-called "inmate mailbox rule" to the filing of a notice of appeal (Rule 4) and all other documents (Rule 13) by self-represented parties confined in an institution. These amendments are intended to incorporate the concerns highlighted by the Supreme Judicial Court in Commonwealth v. Hartsgrove, 407 Mass. 441, 445 (1990), as to the limitations of a person confined in an institution to effectuate the "mailing" of a document on a certain day. Documents will be deemed filed on the date an inmate deposits the document in the institution's internal mail system, and then the time period for any party to respond to an inmate's filing runs from the date the filing is docketed by the appellate court.

Motions. Although Rule 15(b) continues to allow an appellate court to act on motions for procedural orders without awaiting a response, Rule 15(a) was amended to encourage parties to state in their motion whether it is assented to, opposed, and, if opposed, whether the other party intends to file an opposition. This is intended to encourage the parties to communicate about whether a response will be filed prior to the filing of a motion to avoid the unnecessary consumption of time, effort, and expense to both the parties and the appellate court.

Throughout the Rules, references to Rule 27 "Petitions for Rehearing" were changed to "Motion[s] for Reconsideration or Modification of Decision" to more appropriately describe such filings which rarely, if ever, seek an oral argument and rehearing of a case before the justices and instead typically request a reconsideration or modification of the decision.

Amended Rule 29(b) requires a motion for voluntary dismissal in a criminal case to be accompanied by an affidavit by the defendant-appellant or include an attestation by counsel stating that the defendant-appellant assents to the dismissal of an appeal with prejudice. This new requirement codifies the appellate courts' long-standing requirement for such supporting documentation. It does not apply when the motion states that the appeal is moot.

Content of Briefs. Rule 16(a) was reorganized to detail, in checklist format, the contents of an appellant's brief. The amended Rule explicitly states existing requirements that were not previously referenced in the Rules, such as the need for a corporate disclosure statement in accordance with S.J.C. Rule 1:21, and the decisional-law requirement that any request for an award of appellate attorney's fees be made in the brief. The amendments also create new requirements that a party identify the standard of review for each issue raised, and include record references in the statement of the case section. Similar to Appeals

Court Rule 1:28's requirement that a brief's addendum include copies of any cited Appeals Court unpublished decision, Rule 16 now requires a brief's addendum to include a copy of any unpublished decision cited in the brief. A summary of the argument is now required for briefs with argument sections exceeding 20 pages (previously 24 pages) or 4,500 words if the brief is produced in a proportionally spaced font.

Rule 16(b) incorporates the requirements of an appellant's brief and applies them to an appellee's brief, except as otherwise provided, and includes a new requirement that the appellee include an addendum just like an appellant, even if the materials included were already included in the appellant's addendum.

New Rule 16(j) clarifies that a party may file only one brief in response to the service of multiple briefs, and may not file separate briefs in response to each brief. Finally, new Rule 16(n) details the procedures for filing an amended brief, including that a motion showing good cause is required, and clarifies that unless otherwise ordered, the filing of an amended brief has no effect on any filing deadlines.

Record Appendices. Rule 18 was reorganized to detail, in checklist format, the required contents of a record appendix. The Rule also now cautions parties that the lower court does not transmit the entire record to the appellate court and that the failure to provide sufficient transcripts can result in waiver of issues. These warnings are intended to remove sources of confusion that often befuddle attorneys and self-represented litigants.

Briefing in Cross Appeals. Another significant amendment to the Rules concerns briefing in a cross appeal, delineated in Rule 20(a)(3). Consistent with Fed. R. App. P. 28.1, the amended Rule recognizes that in an appellee/cross-appellant's principal brief, the appellee must both respond to the arguments in the appellant's brief and present the appellee's arguments in the cross appeal, and that the appellant/cross-appellee's reply brief must both respond to the arguments in the appellee's principal brief in the cross appeal and reply to the appellee's arguments in the appeal. Accordingly, Rule 20(a)(3) enlarges the limit of the appellee/cross-appellant's brief to 60 pages or 13,000 words, and the appellant/cross-appellee's reply brief to 50 pages or 11,000 words.

Amicus Briefs. Rule 17 now clarifies that a motion for leave to file is not required when an appellate court has solicited amicus briefs in the case. It also features a uniform filing deadline for all amicus briefs of 21 days prior to oral argument, unless leave is given for later filing. While making the formatting provisions of Rule 20 applicable to an amicus brief, the amendments provide that an amicus brief need only include certain enumerated content requirements of a party's brief in Rule 16 (i.e., amicus briefs need not provide statements of the case, facts, or standard of review). Consistent with Fed. R. App. P. 29 and Supreme Judicial Court precedent, Rule 17 now requires disclosure of certain information relating to an amicus curiae or its counsel's relationship to a party or interest in the relevant legal issue or transaction.

Format of Filings. Amendments to Rule 20 modify and clarify the format requirements for filings and are intended to promote consistency with the appellate courts' electronic-filing procedures. Importantly, the amended Rule states that page numbers shall appear in the margin and begin pagination with the cover as page 1, and pages thereafter numbered consecutively through the last page. Any addendum should continue the pagination of the document itself without beginning again at page 1. In cases involving multi-volume appendices, each volume shall be separately paginated. Color covers remain a requirement for paper-filed briefs, but no color cover is required for any electronically-filed brief.

Number of Paper Copies of Brief and Record Appendix to be Filed. Amendments to Rule 19 reduce the number of paper copies of a brief and record appendix filed in the Appeals Court from 7 to 4, and in the

Supreme Judicial Court from 18 to 7. Due to advances in the appellate courts' paperless practices, fewer copies of each document are needed to process and review filings. Notably, as of September 1, 2018, the Appeals Court Standing Order Concerning Electronic Filing requires all attorneys with cases in the Appeals Court to register in eFileMA.com and to e-file all briefs and appendices in non-impounded criminal and civil appeals, and encourages the e-filing of impounded documents in all cases.

E-Filing Costs Taxable in Civil Cases. Amendments to Rule 26 include as taxable costs the fees incurred using the electronic-filing system, which include administrative fees and convenience fees, such as credit card convenience fees.

Distinguishing "Decision" from "Rescript." Rules 1, 23, 27, and 27.1 were amended to clarify the distinction between the appellate clerk's release of a decision to the parties and the public, and the clerk's issuance of the rescript to the lower court. It is the release of the "decision" as defined in Rule 1(c) that commences the timeframe to file a motion for reconsideration or modification of decision (formerly known as a "petition for rehearing") or an application for further appellate review.

Electronic Notice from Clerk. Rule 31 was amended to provide that the clerk shall send notice to the electronic business address of an attorney that is registered with the Board of Bar Overseers, and may send paper notice by conventional mail.

Effective Date. The amendments will become effective March 1, 2019 and govern procedures in appeals to an appellate court then pending and thereafter commenced. In advance of the effective date, parties are invited by the appellate courts to immediately begin filing their appellate documents in compliance with the formatting and filing provisions of the amended Rules, on a voluntary basis. This includes use of the new word count alternative to the page limit and the filing of a reduced number of copies of briefs and appendices in the Supreme Judicial Court. However, amendments affecting time deadlines do not become effective until March 1, 2019 and until that date parties must continue to use the existing time deadlines.

Where to Find the Amended Rules. The Rules in their proposed form and the Supreme Judicial Court's approval may be viewed on the Judicial Branch's [website](#).

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