

## **MASSACHUSETTS RULES OF APPELLATE PROCEDURE**

### **Rule 20(a). Less Than a Full Jury**

#### **DRAFT Reporter's Notes--2020**

#### **Proposed Reporter's Note to Mass. R. A. P. 20**

Rule 20(a)(1) was amended by labeling the existing paragraph as (A), with no change to its text, and adding (B) as a new paragraph. Rule 20(a)(1)(B) is similar to Fed. R. App. P. 32(a)(1)(C), but requires citations for all visual aids, encompasses visual aids beyond those listed in the federal rule, limits inclusion of certain sensitive material, and, consistent with Mass. R. A. P. 18(a)(1)(F), requires that visual aids be of high quality, legible and accurate representations, and in color if color is relevant. Rule 20(a)(1)(B) allows parties to include visual aids in an appellate brief, as well as in any application for direct or further appellate review, or response thereto. While visual aids appearing in the lower court record are required to be reproduced in the record appendix when appropriate, see Mass. R. A. P. 16(e) and 18(a)(1)(A), their inclusion in briefs, applications, or responses has not been expressly endorsed in the rules. Nevertheless, the appellate courts have traditionally accepted briefs, applications, and responses with visual aids, and this amendment codifies that practice.

Visual aids tend to help the reader. For example, a visual aid may make it easier to conceptualize a location at issue, relationships among parties, an organization's structure, a sequence of events, or the factual or procedural history of the case. The new paragraph (B) to Rule 20(a)(1) eliminates any uncertainty about whether visual aids may be used and promotes awareness of the option.

Mass. R. A. P. 20(a)(1)(B)(i)–(iii) are not included in Fed. R. App. P. 32(a)(1)(C). These subparagraphs establish conditions for using visual aids and identify certain visual aids that are prohibited. First, Mass. R. A. P. 20(a)(1)(B)(i) specifies that, to be included in a brief, application, or response, a visual aid must be supported by appropriate citation. The addition of Mass. R. A. P. 20(a)(1)(B) is not intended to change current practice or rules concerning the types of information permitted in briefs, applications, or responses, or citation or record appendix requirements. Accordingly, a visual aid derived from the record below must be supported by citation(s) to the record, *see* Mass. R.A.P. 16(e), and the portion(s) of the record from which the visual aid appears or is derived must be reproduced in the record appendix, *see* Mass. R. A. P. 18(a)(1)(A)(v). To the extent other facts, information, or argument beyond the record below would be permitted in the text of a brief, application, or response, *see, e.g.*, Mass. Guide to Evid. Art. II, it may be included as a visual aid, but any such visual aid must be supported by citation to its source(s).

Second, Mass. R. A. P. 20(a)(1)(B)(ii) prohibits from inclusion in a brief, application, or response any visual aid that is impounded, depicts a minor, or is graphic or disturbing. This rule

is intended to encourage public access to briefs by limiting their impoundment solely because of visual aids. Other goals are to avoid inclusion of graphic or disturbing visual aids in publicly-available briefs, which are automatically posted to the appellate courts' websites, and to control which court personnel besides the justices see graphic or disturbing content. In addition, the rule is intended to protect minors and others with legitimate privacy interests. Images of any person or party, even adults, are disfavored, and should not be included in a brief, application, or response unless the image or a person's appearance or identity is at issue on appeal. The court may sua sponte or upon motion strike any material that is inappropriate.

Third, Mass. R. A. P. 20(a)(1)(B)(iii) requires that visual aids be legible and accurate, and in color if the visual aid is a reproduction of an exhibit marked or admitted below in color or if color is relevant, consistent with Mass. R. A. P. 18(a)(1)(F).

Length Limitations. Because visual aids add length to a brief, application, or response, they must be accounted for in determining its length. Accordingly, amendments to Mass. R. A. P. 20(a)(2)(D) and 20(a)(3)(F) clarify that any visual aids included in a brief, application, or response count towards the applicable length limit as described herein. For parties using a proportionally-spaced font and word limit, only visual aids with words or numerals will count towards the final word count of the document. The committee understood that the "word count" feature of common word-processing programs may not recognize and calculate words or numerals included in a visual aid. A party filing a brief, application, or response using the word-limit option is responsible for manually counting words and numerals in visual aids, if necessary, and reflecting that information on the certificate of compliance required by Mass. R. A. P. 16(k). The certificate may explain the basis of the calculation or any estimate. For parties using a monospaced font and page limit, any visual aid, regardless of whether it has text, must be included in the length limit. *See* Rule 20.

Parties are cautioned that the inclusion of visual aids may increase substantially the megabyte size of an electronic brief, application, or response, thereby rendering the file too large to file electronically as a single document. This is particularly true for documents that include a visual aid in color.

Finally, Mass. R. A. P. 20(a)(4)(C) is amended to explicitly provide that visual aids may be single spaced.