

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

At the Supreme Judicial Court holden at Boston within and for said Commonwealth on the second day of November, in the year of two thousand and twenty-three:

present,

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| <u>KIMBERLY S. BUDD</u> |) | Chief Justice |
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| <u>FRANK M. GAZIANO</u> |) | |
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| <u>DAVID A. LOWY</u> |) | Justices |
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| <u>ELSPETH B. CYPHER</u> |) | |
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| <u>SCOTT L. KAFKER</u> |) | |
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| <u>DALILA ARGAEZ WENDLANDT</u> |) | |
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| <u>SERGE GEORGES, JR.</u> |) | |

ORDERED: That the Massachusetts Rules of Civil Procedure adopted by order dated July 13, 1973, as amended, to take effect on July 1, 1974, are hereby amended as follows:

Rule 5

By deleting the current Rule 5(b) and inserting in lieu thereof the attached Rule 5(b).

Rule 6 By deleting the current Rule 6(d) and inserting in lieu thereof the attached Rule 6(d).

Rule 6 By deleting the current Rule 6(e).

The amendments accomplished by this order shall take effect on December 1, 2023.

ORDERED:

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| <u>KIMBERLY S. BUDD</u> |) | Chief Justice |
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| <u>FRANK M. GAZIANO</u> |) | |
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| <u>DAVID A. LOWY</u> |) | Justices |
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| <u>ELSPETH B. CYPHER</u> |) | |
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| <u>SCOTT L. KAFKER</u> |) | |
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| <u>DALIA ARGAEZ WENDLANDT</u> |) | |
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| <u>SERGE GEORGES, JR.</u> |) | |

MASSACHUSETTS RULES OF CIVIL PROCEDURE

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(b) Same: How made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the person or by mailing it to the person at the person's last known address or, if no address is known, by leaving it with the clerk of the court. Service may also be made by e-mail as provided in Rule 5(b)(1) or through the Electronic Filing Service Provider pursuant to Rule 7(b) of the Massachusetts Rules of Electronic Filing. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the person's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(1) *Service by E-mail.* Service may be made by e-mail, except as otherwise provided in these Rules, or unless the court otherwise orders or the parties otherwise stipulate.

(A) *Primary Business E-mail Address, Attorney of Record.* An attorney of record must, in accordance with Rule 11(a)(1), state a primary business e-mail address on the initial pleading and any other document required to be served under Rule 5(a). Thereafter, service in the proceeding may be made using the e-mail address so stated. If, for any reason, an attorney of record changes a primary e-mail address, cannot be served at a primary e-mail address previously provided, or has not previously provided a primary e-mail address, the attorney of record shall promptly communicate that to all other attorneys of record and self-represented parties and provide an active primary e-mail address.

(B) *Secondary Business E-mail Addresses, Attorney of Record.* An attorney of record may designate up to two secondary business e-mail addresses by communicating such secondary e-mail addresses to all other attorneys of record and self-represented parties and requesting that service be made to such secondary e-mail addresses. Thereafter, e-mail service must be directed to all designated e-mail addresses in the proceeding.

(C) *Self-Represented Parties.* Pleadings and other documents may not be served by e-mail upon a self-represented party, unless that self-represented party consents in writing, which may be by e-mail, in which case the self-represented party shall be fully subject to Rule 5(b)(1)(A)-(F). A self-represented party who has consented to service by e-mail may withdraw such consent in writing, which may be by e-mail, or by leave of court. Notwithstanding the foregoing, service by e-mail on an incarcerated self-represented party is not authorized under any circumstances.

(D) *Effective Time of E-mail Service.* Service by e-mail is complete upon pressing "send" or its equivalent, unless the person making service receives notice or otherwise reasonably should be aware that the e-mail was not successfully transmitted. If the person making service learns that the e-mail was not successfully transmitted, the person must promptly resend the document to the intended recipients by e-mail or by another means authorized by Rule 5(b). Any document served by e-mail by 11:59 P.M. on a business day shall be considered served on that date. Any document served by e-mail on a Saturday, Sunday, or legal holiday shall be considered served the next business day.

(E) *Documents Served by E-mail.* Documents served by e-mail may be transmitted via attachment or by providing a link within the body of the e-mail that will allow the party to download the documents.

(F) *Defective Service.* Any party who claims that the party did not receive documents that were purportedly served by e-mail may move for relief from any ruling, entry of default, or other adverse action that arose from the allegedly defective service.

MASSACHUSETTS RULES OF CIVIL PROCEDURE

RULE 6. TIME

(d) Additional Time After Mail or Electronic Service. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other papers upon the party and the notice or paper is served upon the party by mail, by e-mail pursuant to Rule 5(b)(1), or otherwise electronically, including through the Electronic Filing Service Provider pursuant to Rule 7(b) of the Massachusetts Rules of Electronic Filing, three (3) days shall be added to the prescribed period.

MASSACHUSETTS RULES OF CIVIL PROCEDURE

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

Reporter's Notes--2023

Rule 5(b) has been amended to add e-mail as a permissible method of serving pleadings subsequent to the original complaint and other documents on other parties to the case. Previously, Rule 5(b) permitted service of such documents to be made upon attorneys and self-represented parties (1) by delivery, (2) by mail to their last known address, (3) by leaving them with the clerk of court if no address is known, (4) through the court's Electronic Filing Service Provider as set forth in the Massachusetts Rules of Electronic Filing (Mass. R. E. F.) for cases using the court's electronic filing system, or (5) by email if the parties so agreed in writing. The amendment authorizes the use of e-mail service, regardless of whether the parties are using the court's electronic filing system and without the need for a written agreement of the parties.

Service by e-mail was first authorized by virtue of a Supreme Judicial Court Order issued at the beginning of the COVID-19 pandemic. Order Concerning Email Service in Cases under Rule 5(b) of Mass. Rules of Civil Procedure, effective March 30, 2020.

A survey of the bar conducted during the pandemic by the Supreme Judicial Court regarding various emergency COVID-19 orders showed that 89.7% of participants favored the continuation of the COVID-19 Order authorizing email service and that 72.5% favored its adoption by rule. Although there was overwhelming support for e-mail service, a concern raised by attorneys in the survey noted the ease with which e-mails may be overlooked, in particular where they may end up in a spam or junk e-mail file and the possible negative consequences of overlooking e-mails (for example, defaults, dismissals, disciplinary proceedings, and malpractice claims). In light of this legitimate concern, the Standing Advisory Committee on the Rules of Civil Procedure, in recommending the adoption of e-mail service, reminds lawyers of the need to monitor their e-mail. As stated by the Supreme Judicial Court in its COVID-19 order authorizing e-mail service, “[a]ttorneys must periodically check their ‘spam,’ ‘quarantine,’ or equivalent folders to ensure that a party’s email is not being blocked or diverted to those folders.”

This amendment, modeled on the pandemic order, was intended to make permanent the temporary authorization of e-mail service under Rule 5(b). The Standing Advisory Committee on the Rules of Civil Procedure concurred with the sentiments expressed by some attorneys responding to publication for comment that the draft rule would reduce the need for printed copies and facilitate service of documents for attorneys working remotely.

In the course of amending Rule 5(b), non-substantive stylistic changes were also made.

Rule 5(b)(1), first paragraph.

E-mail service is authorized as a method of service under Rule 5(b) unless otherwise provided in the Massachusetts Rules of Civil Procedure or unless the court has ordered otherwise or the parties have agreed otherwise.

For cases using the court's electronic filing system, the Massachusetts Rules of Electronic Filing provide that where a user of the court's e-filing system "receives notice that electronic service [through the court's e-filing system] on any party was undeliverable, the filing User shall then serve the document on that party by conventional methods." Mass. R. E. F. 7(c). The term "conventional method" is defined as "court rules and procedures that would apply in the absence of electronic filing." Mass. R. E. F. 2. Rule 5(b) is the court rule applicable to service of documents on parties after the original complaint absent electronic filing. The addition of e-mail to the list of methods of service under Rule 5(b) therefore means that e-mail service directed to a party's primary business e-mail address (and secondary business e-mail address, if applicable; see below) is a "conventional" method of service. As such, e-mail service can be used when service is undeliverable through the court's e-filing system.

Rule 5(b)(1)(A).

Attorneys are required to include their business e-mail address on all pleadings (Rule 11(a)(1)) and all motions and other papers (Rule 7(b)(2)). Rule 7(b)(2) makes the provisions regarding signing and matters of form for pleadings set forth in Rule 11 applicable to motions and other papers. Rule 5(b)(1)(A) reiterates this requirement and provides for an attorney's "primary business e-mail address" to be used as the e-mail address for e-mail service. An attorney should use the same primary business e-mail address as set forth in the attorney's Board of Bar Overseers Registration statement. See Supreme Judicial Court Rule 4:02 and Rule 11(a), as amended in 2021, including 2021 Reporter's Notes. An attorney may provide a secondary business e-mail address as well; see Rule 5(b)(1)(B) below. Attorneys should take appropriate steps to update the court and other parties promptly upon a change in their e-mail address.

Rule 5(b)(1)(B).

This provision allows an attorney to designate up to two secondary business e-mail addresses by so informing all other attorneys and self-represented parties, in which case e-mail service must be made using the primary business e-mail address *and* any secondary business e-mail addresses. Secondary e-mail addresses may be those of another attorney, a law firm's file management e-mail address, a paralegal, support staff, or anyone else. This may serve to reduce the chances of an attorney being unaware of service of a document because an e-mail was lost, blocked, labeled as spam, or otherwise overlooked in the all-too-frequent daily barrage of e-mails.

Rule 5(b)(1)(C).

This paragraph adopts the provision from the COVID-19 Order prohibiting e-mail service on a self-represented party unless the self-represented party has consented in writing to receiving

e-mail service. A self-represented party may so consent by e-mail and may later withdraw consent in writing (including by e-mail) or by leave of court. The exclusion of self-represented parties likely is a recognition that attorneys are required by Supreme Judicial Court Rule 4:02(1) to have a business e-mail address, while self-represented parties are not required to have an e-mail address. (See the language in Rule 11(a)(1) that self-represented parties shall state their e-mail address, “if any.”) Service by e-mail may not be made on an incarcerated self-represented party.

Rule 5(b)(1)(D); Additional Time after E-mail Service.

This paragraph adopts the provision from the COVID-19 Order addressing the time when e-mail service is deemed to have been made. E-mail service is deemed complete upon hitting “send” or its equivalent on the sending device, “unless the person making service receives notice or otherwise reasonably should be aware that the e-mail was not successfully transmitted.”

A simultaneous amendment to Rule 6(d) provides that if a party is served by e-mail, an additional 3 days shall be added to any time period where a party has the right to act or take some act after having been served. This additional 3-day period has in the past applied to service by mail and service through the court’s Electronic Filing Service Provider, and e-mail service is now treated the same.

Rule 5(b)(1)(E).

Documents may be attached to the e-mail or may be accessed by a link within the text of the e-mail allowing a recipient to download them.

There are no provisions in the rule regarding mandatory language in the subject line or text of the e-mail nor regarding PDF format of documents or file size restrictions. The reasons for not including in the Massachusetts rule requirements such as PDF format and size restrictions were aptly stated in a Committee Comment to an Illinois rule allowing e-mail service:

In amending...[the Illinois rule] to provide for e-mail service, the Committee considered whether special additional rules should apply to documents served by e-mail, e.g., specified file formats, scan resolutions, electronic file size limitations, etc. The Committee rejected such requirements in favor of an approach which provides flexibility to adapt to evolving technology and developing practice. The Committee further anticipates good faith cooperation by practitioners. For example, if an attorney serves a motion in a format which cannot be read by the recipient, the Committee expects the recipient to contact the sender to request an alternative electronic format or a paper copy.

Ill. Sup. Ct. Rule 11, Committee Comment, 2015.

There are also no provisions in the rule regarding electronic security precautions, such as password-protected links or attachments. Parties are encouraged to consider security precautions

in appropriate circumstances, particularly when the document being served contains information that calls for a higher degree of security.

Rule 5(b)(1)(F).

This provision allows a party claiming lack of receipt of emailed documents to seek relief from any court ruling or other action that may have resulted from lack of receipt.

RULE 6. TIME

Reporter's Notes--2023

Rule 6 was amended in 2023 with the adoption of e-mail service as a recognized method to serve documents under Rule 5. See 2023 Reporter's Notes to Rule 5.

The amendment deleted Rule 6(e), which had been added in 2021 to provide an additional 3 days to respond to a document that was served electronically, and relocated its provisions to revised Rule 6(d). Under revised Rule 6(d), 3 days are added to any time period where a party must act after having been served by mail, by e-mail, or through the court's Electronic Filing Service Provider.

The words "or take some proceedings," which had appeared in Rules 6(d) and (e), have been stricken from revised Rule 6(d) in an attempt to simplify the rule since it seemed redundant. No change in meaning was intended.

In the course of amending Rule 6, non-substantive stylistic changes were also made.