

SUPREME JUDICIAL COURT

Boston, Massachusetts 02108

NOTICE OF APPROVAL

Notice is hereby given that the Supreme Judicial Court has approved and promulgated rules as further indicated below.

RALPH D. GANTS
Chief Justice

-
1. Court Submitting Rules for Approval:

Superior Court

2. Date Rules Submitted for Approval:

July 3, 2020

3. Date Approved & Promulgated by the Supreme Judicial Court:

July 8, 2020

4. Rule or Rules, or Amendments Thereto, Approved and Promulgated:

Amendment to Superior Court 61A, 63 and 73, as described in the enclosed letter from Chief Justice Judith Fabricant.

5. Effective Date:

August 1, 2020

(The original of this notice is to be filed in the office of the Clerk of the Supreme Judicial Court for the Commonwealth, and a copy to be sent by the Clerk to the court which requested approval of the rules.)



THE TRIAL COURT OF MASSACHUSETTS
SUPERIOR COURT

Suffolk County Courthouse
Three Pemberton Square, 13th Floor
Boston, MA 02108

Judith Fabricant
Chief Justice

Elaina M. Quinn
Deputy Court Administrator

July 3, 2020

Hon. Frank M. Gaziano
Chair of the Rules Committee
Supreme Judicial Court
John Adams Courthouse, Suite 2200
One Pemberton Square
Boston, MA 02108

RE: Request for Amendments to Superior Court Rules 61A, 63, and 73

Dear Justice Gaziano:

I submit for approval by the Supreme Judicial Court proposed amendments to:

- Superior Court Rule 61A: Motions for Post-conviction Relief
- Superior Court Rule 63: Court Reporter in Grand Jury Proceedings
- Superior Court Rule 73: Medical Malpractice Cases

I. Rule 61A

The amendments come in response to the Supreme Judicial Court's Order Governing Appeals from Convictions of Murder in the First Degree (dated August 6, 2019; effective September 4, 2019). The proposed amendments replace existing 61A(C) with a new subsection (C), and re-letter and rewrite 61A(C), making a new 61A(D).

The justices of the Superior Court gave preliminary approval to the proposed amendments at the Court's semi-annual business meeting on December 6, 2019. The proposal was posted for comment on the Superior Court's website on December 17, 2019, and notice was sent to Massachusetts Lawyers Weekly the same day. The Court set a deadline of February 1, 2020, for submitting comments. Comments were received and a revised version of the proposed amendments were circulated to the justices, who gave final approval to the amendments by email on June 5, 2020, and voted to submit the proposal to the SJC for its approval.

II. Rule 63

The amendments bring the rule into conformity with current practice, given that the Superior Court no longer is staffed with court reporters.

The justices of the Superior Court gave preliminary approval to the proposed amendments at a Zoom meeting of the Court on May 29, 2020. The proposal was posted for comment on the Superior Court's website on June 8, 2020, and notice was sent to Massachusetts Lawyers Weekly the same day. The Court set a deadline of June 22, 2020, for submitting comments. No comments were received. The justices gave final approval to the amendments at a Zoom meeting of the Court on June 29, 2020, and voted to submit the proposal to the SJC for its approval.

III. Rule 73

The only substantive change is to Rule 73(2)(d), which concerns non-MD tribunal members. The change recognizes that licensing agencies for non-MD health care providers are not in a position to provide case-specific lists, but that professional associations for some medical specialties may do so. Besides this change, a few minor technical changes are also proposed.

The justices of the Superior Court gave preliminary approval to the proposed amendments at the Court's semi-annual business meeting on December 6, 2019. The proposal was posted for comment on the Superior Court's website on December 17, 2019, and notice was sent to Massachusetts Lawyers Weekly the same day. The Court set a deadline of February 1, 2020, for submitting comments. No comments on the proposed amendments were received. The justices then gave final approval to the amendments by email on June 22, 2020, and voted to submit the proposal to the SJC for its approval.

The Superior Court requests that the SJC approve these proposed rules changes **effective August 15, 2020**. I would be happy to discuss any questions you may have, or provide any additional information. Thank you for your consideration.

Very truly yours,

/S/ Judith Fabricant

Judith Fabricant

cc: Chief Justice Paula M. Carey
Hon. Thomas F. McGuire, Jr., Chair, Superior Court Rules and Forms Committee
Hon. Robert C. Cosgrove, Chair, Superior Court Criminal Committee
Christine Burak, Esq., Secretary of the Rules Committee

Proposed Amendments to Superior Court Rule 61A

Rule 61A. Motions for Post-Conviction Relief

(Applicable to criminal cases)

(A) Contents of the Motion. Motions for post-conviction relief filed under [Mass. R. Crim. P. 30](#) shall contain (1) an identification by county and docket number of the proceeding in which the moving party was convicted, (2) the date the judgment of conviction entered, (3) the sentence imposed following conviction and (4) a statement of the facts and grounds on which the motion is based. The motion shall also contain (5) a statement identifying all proceedings for direct review of the conviction and the orders or judgment entered and (6) a statement identifying all previous proceedings for collateral review of the conviction and the orders or judgments entered.

(B) Docket of Proceedings and Transmission of Papers. After docketing, the Clerk shall attach to all such motions a copy of the docket of the proceedings that resulted in the conviction and shall forward the motion, and accompanying papers, to the Justice who presided at the trial from which the conviction resulted and to the office of the District Attorney or to the Attorney General responsible for prosecuting the case. If the Justice who presided at the trial has retired, or is otherwise unavailable, the Clerk shall forward the motion and accompanying papers to the Regional Administrative Justice for the county in which the conviction occurred.

~~**(C) Action on Motions.** Motions that do not comply with the requirements of paragraph (A) hereof may be summarily denied, without prejudice to renewal when filed in accordance with those requirements. For all motions that do comply with the requirements of paragraph (A), the court may direct the Commonwealth to file and serve an opposition, or may act thereon in the manner it deems appropriate and as authorized by [Mass. R. Crim. P. 30](#).~~

(C) Response to Motion: Unless otherwise ordered by the court, the Commonwealth shall file a response within thirty days, or in the case of a motion for a new trial for a defendant who has been convicted of first degree murder, within ninety days, of the Clerk's forwarding the motion to the Commonwealth pursuant to paragraph (B).

(D) Action on Motions. The court may act upon any motion in the manner it deems appropriate and as authorized by Mass. R. Crim. P. 30. Motions that do not comply with the requirements of paragraph (A) hereof may, upon motion of the Commonwealth or the court's own motion, be summarily denied, without prejudice to renewal when filed in accordance with those requirements.

Proposed Amendments to Superior Court Rule 63

Current version:

Rule 63. Court Reporter in Grand Jury Proceedings

(Applicable to criminal cases)

Stenographic notes of all testimony given before any grand jury shall be taken by a court reporter, who shall be appointed by a justice of the superior court and who shall be sworn. Unless otherwise ordered by the court, the court reporter shall furnish transcripts of said notes only as required by the district attorney or attorney general.

Proposed amended version:

Rule 63. Recording of Grand Jury Proceedings

(Applicable to criminal cases)

All testimony given before a grand jury shall be recorded by a court reporter appointed by a justice of the Superior Court, who shall be sworn, or recorded electronically by a method approved by the Trial Court. Unless otherwise ordered by the court, transcripts of the record of the testimony shall be furnished only as required by the district attorney or attorney general.

Proposed Amendments to Superior Court Rule 73

(changes noted in boldface, brackets, underlines, and strikethroughs)

Superior Court Rule 73. Medical Malpractice Cases

(Applicable to All Counties)

(applicable to all cases subject to G. L. c. 231, § 60B (medical malpractice))

1. Offer of Proof; Failure to File.

a. Within 15 days after each defendant's answer has been filed in a case subject to G.L. c. 231, § 60B, the plaintiff(s) shall file the offer of proof with the clerk and provide a copy to the defendant(s). The parties may agree to a different deadline, in a written stipulation filed with the court. For purposes of cases referred for a tribunal from other trial court departments, or the federal courts, the date of docketing of the referral in the Superior Court shall be substituted for the date of filing of the answer.

b. Upon a plaintiff's failure to file a timely offer of proof, the court may find, upon motion of a party or its own initiative, that the plaintiff has failed to present sufficient evidence to raise a legitimate question of liability appropriate for judicial inquiry as to the defendant who filed the answer. A plaintiff's failure to file a timely offer of proof shall waive the plaintiff's right to a tribunal before entry of such a finding by the court.

c. By motion, or on its own initiative, the court may schedule a prompt conference **[deleted comma]** in addition to, or in lieu of, the procedures set forth in parts 2-6, below.

2. Demand for Tribunal; Notice to Massachusetts Medical Society; Duties of Party Demanding a Tribunal.

a. Any party who demands a tribunal under § 60B ("Filing Party") shall file a document entitled "Demand for Tribunal" within 30 days of the filing of the answer, after reviewing the offer of proof, if any. The Demand for Tribunal shall specify each respect, if any, in which the Filing Party claims that the offer of proof fails to raise a legitimate question of liability appropriate for judicial inquiry.

b. Any defendant's failure to file a timely Demand for Tribunal shall waive that defendant's right to a tribunal.

c. If the defendant is a licensed physician or a medical institution or facility:

- i. The Demand for Tribunal shall (A) specify the field of medicine in which the alleged injury occurred and (B) list each county where the defendant practices and each county where the defendant resides, or if the defendant is a medical institution or facility, shall list the county where the institution or facility is located. The Filing Party shall consult with all other parties, and if there is disagreement about the field of medicine or county, shall include all fields and counties identified by any party.

11. The Filing Party shall, simultaneously with filing, serve the Demand for Tribunal on all parties of record or their counsel and the Massachusetts Medical Society (“Society”). Any Demand for Tribunal sent to the Society shall state prominently that:

1. A medical malpractice tribunal will occur if the Society timely submits a case-specific list consisting of the name(s) of physicians representing the field of medicine in which the alleged injury occurred and licensed to practice medicine and surgery in the commonwealth under the provisions of section two of chapter one hundred and twelve; and that the list shall consist only of physicians who practice medicine outside the county where the defendant practices or resides or if the defendant is a medical institution or facility outside the county where said institution or facility is located; and

2. The Court considers a submission timely if the Society provides the information to the clerk, with copies to all parties or their counsel, within 30 days of receiving the Demand for Tribunal.

d. If the defendant is not a licensed physician, the Filing Party shall obtain a case-specific list from the pertinent ~~licensing agency~~ **source approved by the Chief Justice of the Superior Court** and provide it to the clerk within 90 days after the answer is filed, with advance notice to other parties, who may participate if they choose.

e. For purposes of this rule, a “case-specific list” means: (1) if the defendant is a physician, a list of physicians who meet the criteria appearing in par. 2.c.ii.1 **[added “c” to this citation]** or (2) if the defendant is not a physician, a list consisting of the name(s) of representatives of the field of medicine in which the alleged injury occurred who are licensed to practice in that field under the laws of the Commonwealth; provided that the list shall consist only of such representatives who practice outside the county where the defendant practices or resides.

3. Tribunal. The clerk shall schedule the tribunal as soon as practicable upon receipt from the Society (or the Filing Party under paragraph 2(d)) of the information required **by** **[added the word “by”]** paragraph 2(c) or 2(d). The clerk shall send notice of the date and time of the tribunal hearing to all parties or their counsel, listing the panel members’ names and contact information. The plaintiff shall send a copy of the offer of proof to each panel member at least 5 days before the tribunal hearing.

Until the clerk receives a case-specific list of eligible and available physicians or medical providers, the clerk has no statutory responsibility to schedule a tribunal, but may, in the exercise of discretion, choose to devote available resources in a timely manner to identify an eligible physician or medical provider member of the tribunal.

4. Delay in Providing the Case-Specific List of Physicians or Medical Providers to the Clerk. If the clerk does not receive a case-specific list of providers within 90 days after the answer is filed, the clerk shall schedule a hearing before a single judge to determine whether the offer of proof, if properly substantiated, is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff’s **[apostrophe added to “plaintiff’s”]** case is merely an unfortunate medical result. Such determination shall be without prejudice to reconsideration by a full tribunal, consisting of medical member, attorney, and judge, as provided in

part (2) of the next sentence hereof. If the clerk later receives a case-specific list of providers, then: (1) if the hearing has not already occurred, it shall occur before a full tribunal; (2) if the hearing has already occurred, and if any party files a motion for reconsideration by a full tribunal, the court shall allow such motion unless it determines that allowing the motion would unduly delay the trial.

5. Voluntary Waiver of Tribunal. Any party may waive a right to a § 60B tribunal consisting of three members, without thereby waiving any other rights or arguments in the case. If the plaintiff waives the tribunal, the court shall require posting of a bond in the statutory amount, without prejudice to the right of either party to move to increase or reduce the amount of the bond. If the defendant waives the tribunal, the court may allow the plaintiff(s) to proceed without a bond and need not schedule any further § 60B hearing [**“h” changed to lower case**] with respect to that defendant. Upon waiver of the tribunal, the clerk shall send an informational copy of the complaint and offer of proof to the Board of Registration in Medicine with a clear disclaimer that no tribunal occurred under § 60B because the defendant waived the tribunal but reserved all rights to challenge the claims in the offer of proof at trial.

6. Stay.

a. No medical malpractice lawsuit is automatically stayed pending a tribunal decision, but a session judge may enter a stay, upon motion in compliance with Superior Court Rule 9A, if the Demand for Tribunal identifies a serious issue with the offer of proof and the plaintiff does not post a bond.

b. Notwithstanding subparagraph a, in the absence of a court order, no defendant is required, over objection, to take any action if the plaintiff does not timely post a bond (i) after failing to file a timely offer of proof or (ii) after a tribunal finding adverse to the plaintiff as to that defendant.

7. Trial Assignment Conference; Case-Specific Management.

a. Notwithstanding Standing Order 1-88, the parties in all medical malpractice cases shall appear at a trial assignment conference, to be scheduled by the court not later than 18 months after filing of the complaint. The parties shall be prepared to commit to a trial date within the tracking order, as well as to dates for expert disclosures. At the trial assignment conference, the court and parties will also select a date for a final pretrial conference at which they will file a pretrial memorandum and discuss the case’s potential for resolution. The parties must discuss the potential for resolution with their clients and any other entity or individual with settlement authority, before the pretrial conference. **[comma replaced with period]**

b. Any party who seeks to advance the case for earlier determination pursuant to G.L.

c. 231, § 59C, may file a Motion For Case-Specific Management pursuant to Superior Court Rule 20 and Standing Order 1-88(B)(2), in compliance with Superior Court Rule 9A.

8. Judicial Discretion. After considering the impact on prompt resolution of the case and all other equities, the judge may waive any of these requirements or extend any of these deadlines. In ruling on a motion for waiver, the judge may require the moving party to demonstrate good cause and may impose conditions to facilitate timely resolution of the case or to protect the rights of any party opposing the waiver. **[comma replaced with period]**

9. Other Rights. Nothing in this Rule shall be construed to limit the right of any party under generally applicable statutes, rules, orders, or other law to assert or oppose any dispositive or other motion, serve any discovery request, or request a conference under Rule 16 or otherwise at any time. For purposes of this rule, any plaintiff or defendant whose claim or liability is entirely vicarious or derivative has no separate right to a tribunal beyond that asserted by the principal(s), and shall, together with the principal(s), be considered as a single party.

Adopted November 7, 2017, effective January 1, 2018.

Amended: _____