

## PROPOSED AMENDMENTS TO APPELLATE DIVISION RULE 8C

### REDLINED VERSION

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#### Rule 8C. METHOD OF APPEAL: APPEAL ON THE RECORD OF PROCEEDINGS

**(a) In General.** If an appeal is not claimed and perfected under Rule 8A or 8B, a party may appeal based on the record of proceedings as provided in this rule. The record of proceedings shall consist of a ~~typewritten~~ transcript of the electronic ~~or stenographic~~ recording of the proceedings or, where no such record is available, a statement of the evidence, as provided below. No transcript or statement of the evidence shall be required for appeal under this rule where the issue or issues presented ~~is~~ are raised solely by the pleadings.

#### **(b) Filing and Contents.**

*(1) Transcript Orders and Certifications.* Within thirty days after (1) filing the notice of appeal as required by Rule 3 or (2) termination of procedures under Rule 8A or 8B, an appellant appealing under this rule shall file and serve on all other parties a document captioned “Appeal on the Record of Proceedings.” Such filing and service shall be in accordance with Rule 13.

The Appeal on the Record of Proceedings shall consist of a statement that the party intends to proceed under this rule, ~~and, if a transcript will be necessary, shall also include a request for a cassette copy of the electronic recording of the trial proceedings made under the control of the court under Rule 114, Dist./Mun. Supp. R. Civ. P., unless such request was previously included with the notice of appeal. The request for the cassette copy shall be set forth on the required form and shall be accompanied by the appropriate fee.~~ If production of a transcript will be necessary, the appellant shall request transmission of the audio recording of those trial court proceedings relevant to the appeal and order the transcript of those proceedings in accordance with procedures set by the Chief Justice of the Trial Court. The appellant shall file a copy of the transcript orders in the trial court as an attachment to the “Appeal on the Record of Proceedings.” If production of a transcript will not be necessary, the appellant shall certify in the “Appeal on the Record of Proceedings” (i) that no transcript is required because the issue or issues presented for appeal are raised solely by the pleadings or (ii) that the transcript of all proceedings relevant to the appeal is on file with the trial court.

Within 14 days of service of the appellant’s transcript orders or certifications, any other party may order a transcript of additional proceedings in accordance with the procedures set by the Chief Justice of the Trial Court. Such party shall at the same time file a copy of the transcript order with the trial court and serve a copy on all other parties.

~~Upon receipt of a request for cassette copy the clerk shall forthwith order the cassette and shall notify the requesting party immediately upon its availability.~~

**(e) Obtaining Transcript of Cassette.**

*(1) Cassette Designation Statement; Duties of Appellant.* Within fifteen days after receipt of notice from the clerk that the cassette is available, or if the cassette was previously obtained, within fifteen days after filing of the Appeal on the Record of Proceedings, the appellant shall file in court and serve on each appellee a document captioned "Designation for Transcription" which shall include the date of receipt of the cassette; a designation of the parts of the cassette the appellant desires to include in the transcript; and the name, address, and telephone number of the individual or firm selected to prepare the transcript, provided that the appellant and each appellee have agreed to this choice and the appellant so states. If the appellant and appellees have not so agreed, the designation shall also specifically notify the clerk to select the transcriber.

The designation of the parts of the cassette to be transcribed should be precise and include such details as the name of the witness whose testimony has been designated and the portions to be included giving an exact quote of the beginning words and concluding words of each designated portion.

If the selection of an individual or firm to prepare the transcript is not included, the clerk shall select the individual or firm in accordance with procedures promulgated by the Chief Administrative Justice. The clerk shall promptly notify all parties of the selection made by the clerk. Any individual or firm selected to transcribe the record pursuant to this rule is hereinafter called "the transcriber."

If the appellant has designated the entire cassette for transcription, then within the same fifteen days for filing and serving the designation, the appellant shall also send or deliver the cassette to the transcriber with a written order designating the entire cassette for transcription. If the appellant has not designated the entire cassette, then after twenty days have expired from the service upon the appellee of appellant's designation of transcript, the appellant shall send or deliver the cassette to the transcriber with a written order which states those parts of the cassette designated by the parties for transcription. In addition, the order, whether for all or part of the transcript, shall include a statement that the original of the designated portions of the transcript should be sent to the clerk of the trial court, and shall indicate the number of copies, if any, to be sent to the appellant. The appellant shall promptly file with the clerk and serve on the other parties a copy of the order placed with the transcriber.

The appellant shall cooperate with the transcriber by providing such information as is necessary to facilitate transcription, and make satisfactory arrangements with the transcriber to pay for the trial court's original of the designated portions of the transcript and any copies ordered by the appellant for the appellant's own use.

*(2) Duties of the Appellee.* If the appellee deems it necessary to have a cassette in order to consider counter-designating, or for any other purpose, the appellee shall, after receipt of the Appeal on the Record of Proceedings, promptly order the cassette from the clerk or promptly

arrange with the appellant to use the appellant's cassette. If the appellant has not designated and ordered the entire transcript and if the appellee deems a transcript of other portions of the proceedings to be necessary, the appellee shall within fifteen days after receipt of the appellant's designation, file in court, and serve on the appellant, a designation of such additional parts. The designation of the parts of the cassette to be transcribed should be precise and include such details as the name of the witness whose testimony has been designated and the specific portions to be included, giving an exact quote of the beginning words and concluding words of each designated portion. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the trial court for an order requiring the appellant to do so upon such terms and costs as the court may direct. If the appellee desires a copy of designated portions of the transcript, the appellee shall promptly communicate to the transcriber the number of copies wanted and make satisfactory arrangements with the transcriber for payment for the appellee's own copies.

The appellee shall cooperate with the transcriber by providing such information as is necessary to facilitate transcription.

*(3) Duties of the Transcriber.* The transcriber shall prepare an original typed transcript of the designated portions and the requested number of copies in accordance with the designations, and shall deliver the original to the clerk, with the following certificate of accuracy:

I, \_\_\_\_\_, do hereby certify that the foregoing is a true and accurate transcript, prepared to the best of my ability, of the designated portions of the cassette provided to me by the appellant or appellee of a trial or hearing of the \_\_\_\_\_ Division of the \_\_\_\_\_ Court Department in the proceedings of \_\_\_\_\_ v. \_\_\_\_\_, case(s) no.(s) \_\_\_\_\_, before Justice \_\_\_\_\_ on \_\_\_\_\_.

Date: \_\_\_\_\_

The transcriber shall deliver legible copies to all parties who have so requested.

*(4) Unintelligible Portions of the Cassette.* If portions of the cassette cannot be transcribed because they are unintelligible, the parties shall promptly use reasonable efforts to stipulate their content. If agreement cannot be reached, the parties shall promptly present their differences as to such portions to the trial judge who heard the testimony. The trial judge shall, if possible, settle the content of the unintelligible portions, which shall then be included in the transcript.

*(2) Stipulation that Transcript is Unnecessary.* To the extent consistent with the appellant's duty to provide an adequate record to the Appellate Division, the parties may stipulate that that no transcript is required because the issue or issues presented for appeal are raised solely by the pleadings or that the transcription of some of the proceedings relevant to the appeal is unnecessary to the adjudication of the appeal, in which case the appellant need order only the transcript of the proceedings, if any, that the parties agree are necessary to the adjudication of the appeal. The appellant shall file the stipulation with the trial court as an attachment to its "Appeal on the Record of Proceedings."

(c) Costs of Transcription. In any case in which the appellant is entitled to have counsel made available pursuant to Supreme Judicial Court Rule 3:10, the Commonwealth shall pay for the cost of providing the transcript of all proceedings relevant to the appeal, including those designated by the appellee, to the trial court. In all other cases, unless ordered otherwise by the trial court, the appellant shall pay for such costs. If the parties cannot agree on which proceedings are relevant to the appeal, the trial court shall settle the matter upon motion. Payment, if required, for copies of the transcript for the parties shall be governed by procedures set by the Chief Justice of the Trial Court.

(d) Delivery of the Transcript. Upon completion, the transcriber shall deliver the transcript to the clerk of the trial court in accordance with procedures set by the Chief Justice of the Trial Court. The delivery of transcripts to the parties shall be governed by procedures set by the Chief Justice of the Trial Court. Upon receipt of all of the transcripts ordered by the parties, the clerk shall notify all parties within 14 days that the transcripts have been received.

**(d) Stenographic Record Available; Duty of Appellant; Notice to Appellee.** A stenographic record is one made with the permission of the trial court pursuant to Massachusetts Rules of Civil Procedure 80(c) by a stenographer who, upon agreement of the parties, has been approved and designated as the “reporter” for that case by the trial judge.

~~Within ten days after filing the Appeal on the Record of Proceedings, the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he or she deems necessary for inclusion in the record. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he or she shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall within the time above provided, file and serve on the appellee a designation of the parts of the transcript which he or she intends to include in the record. If the appellee deems a transcript of other parts of the proceedings to be necessary, he or she shall, within ten days after the service of the designation of the appellant, file and serve on the appellant a designation of additional parts to be included. If the appellant shall refuse to order such parts as the appellee has designated, the appellee shall apply to the trial court for an order requiring the appellant to do so or requiring the appellant to order a transcript of so much of the record as the trial judge deems appropriate, and upon such costs and terms as he or she may direct. At the time of ordering, a party shall make satisfactory arrangements with the reporter for payment of the costs of the transcript, and for transmission of the original transcript to the clerk.~~

**(e) Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable.** If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may, within thirty days after the Appeal on

the Record of Proceedings is filed, file a statement of the evidence or proceedings from the best available means, including his or her recollection. The statement shall be served on the appellee, who may file objections or proposed amendments thereto within ten days after service.

Thereupon the statement and any objections or proposed amendments thereto shall be submitted to the trial court for settlement and approval and as settled and approved shall be included in the case file and, as necessary, included in the appellant's appendix to the brief.

**(f) Correction or Modification of the Record.** If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court or, if necessary, the Appellate Division, and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation or the trial court or the Appellate Division, on proper suggestion or on its own motion, may direct that the omission or misstatement be corrected and if necessary that a supplemental record be certified and transmitted. If portions of the proceedings cannot be transcribed because they are unintelligible, the parties shall promptly use reasonable efforts to stipulate their content. If agreement cannot be reached, the parties shall promptly present their differences as to such portions to the trial judge who heard the testimony. The trial judge shall, if possible, settle the content of the unintelligible portions, which shall then be included in the transcript. All other questions as to the form and content of the record shall be presented to the Appellate Division.

**(g) Copies, transmission to the Appellate Division.** Within thirty days after notice from the trial court clerk of receipt of the transcript from the transcriber, or within thirty days after settlement and approval of a statement of the evidence or proceedings, as the case may be, the appellant shall file six additional copies of the Appeal on Record of Proceedings. Upon receipt of said copies, the clerk shall transmit them along with six certified copies of the docket entries to the Appellate Division. If the appellant has certified in its Appeal on the Record of Proceedings that a transcript is not required or is on file in the trial court and the appellee has not filed a copy of any transcript order within 30 days of appellant's filing, the clerk shall transmit one copy of the appellant's Appeal on the Record of Proceedings and six certified copies of the docket entries to the Appellate Division. If the appellant has attached to its Appeal on the Record of Proceedings a stipulation by the parties that a transcript is not required, the clerk shall transmit one copy of the Appeal on the Record of Proceedings and six certified copies of the docket entries to the Appellate Division.

### **COMMENTARY (2020)**

The 2020 amendments to Rule 8C model those to Mass. R. App. P. 8 for requesting and producing a transcript of an electronically recorded proceeding. The main difference is that Rule 8C(b) continues to require the appellant to file an Appeal on the Record of Proceedings within 30

days after filing the notice of appeal or termination of the Rule 8A or Rule 8B methods. Since the 10-day period for filing a notice of appeal in the Appellate Division under Rule 4(a) is shorter than the 30-day filing period for an appeal to the Appeals Court under Mass. R. App. P. 4(a)(1), Rule 8C requires the appellant to declare whether it wants a transcript at the same time it files the Appeal on the Record of Proceedings, which is due 30 days from the filing of the notice of appeal, as opposed to 14 days from the filing of the notice of appeal under Mass. R. App. P. 8(b)(1)(A).

Rule 8C(b) has been divided into two paragraphs. Paragraph 1 of Rule 8C(b) requires the appellant, if a transcript will be necessary, to order the transcript of those proceedings relevant to the appeal and file a copy of the transcript order as an attachment to its Appeal on the Record of Proceedings. If a transcript is unnecessary, the appellant must certify in the Appeal on the Record of Proceedings that no transcript is required because the issue or issues presented for appeal are raised solely by the pleadings. The appellant must serve the Appeal on the Record of Proceedings and any attachments on all other parties. Prior requirements regarding designation were deleted from Rule 8C. If the appellee thinks that other proceedings should be transcribed, the appellee may order the transcript of those proceedings within 14 days of the appellant's order. As stated in the Reporter's Notes to Mass. R. App. P. 8, the procedural mechanics of the parties' orders are to be determined by the Chief Justice of the Trial Court in an Administrative Order, to allow flexibility in the transcript request and production processes as technology advances. See, e.g., Trial Court Administrative Order 19-1: Transcription Procedures for Appellate Review.

Paragraph 2 of Rule 8C(b) provides the right of the parties to stipulate that transcription of some or all of the court proceedings is not required for the appeal. The appellant must file the parties' stipulation in the trial court as an attachment to the Appeal on the Record of Proceedings.

Former Rule 8C(c), which governed obtaining a transcript from a cassette, has been eliminated. Rule 8C(c) now governs the cost of producing the transcript and models Mass. R. App. P. 8(b)(1)(C). The Commonwealth is responsible for paying for the transcript for the trial court in all civil cases in which the appellant was entitled to appointed counsel. In other cases, the appellant is required to pay for the transcript for the trial court for all proceedings relevant to the appeal, regardless of whether the appellant or the appellee ordered them. The trial court may settle any dispute over whether transcripts ordered by the appellee are relevant to the appeal and has the authority to shift costs in the interests of justice. Payment of costs for the copies of the transcripts to be provided to the parties is determined by the Chief Justice of the Trial Court in an Administrative Order because it concerns contracts between the Trial Court and transcribers, and will be influenced by the expansion of electronic processes.

An indigent appellant not entitled to appointed counsel may seek a court order for payment by the Commonwealth of transcription costs under G.L. c. 261, § 27C. An indigent appellant entitled to appointed counsel may also, when necessary, seek a court order for payment by the Commonwealth of transcription costs under G.L. c. 261, § 27C. The court's order for payment must be submitted to the Office of Transcription Services in compliance with an Administrative Order by the Chief Justice of the Trial Court.

Former Rule 8C(d), which governs obtaining a transcript from a stenographic record, has been eliminated because proceedings in the District Court and Boston Municipal Court that may be appealed to the Appellate Division are electronically recorded. Rule 8C(d) now models Mass. R. App. P. 8(b)(3) and clarifies that, in all cases, the transcriber must deliver the transcript directly to the trial court clerk, rather than providing it to the ordering party for delivery to the clerk. This clarification is intended to avoid unnecessary delays. The mechanics of such delivery is governed by an Administrative Order by the Chief Justice of the Trial Court, which is intended to allow the Trial Court to take immediate advantage of advances in technology regarding electronic delivery. The trial court clerk has the duty of informing all parties when all transcripts have been received. Of course, a clerk may also inform parties when transcripts of some, but not all, proceedings are received.

Former Rule 8C(c)(4), governing the procedure where portions of a cassette of an electronically recorded proceeding were unintelligible, has been moved to Rule 8C(f), governing correction or modification of the record, and the reference to cassettes has been removed.

Rule 8C(g) has been amended to insert the final two sentences, specifying when the clerk may transmit the appeal to the Appellate Division where the appellant certifies in its Appeal on the Record of Proceedings that no transcript is required or is on file with the trial court and when the parties stipulate, in attachment to the Appeal on the Record of Proceedings, that no transcript is required.

## **COMMENTARY (1994)**

This rule provides the third option for appeal to the Appellate Division. It can be used instead of the other two or after one or both of the other two have been tried but have failed.

Unlike the other two procedures, this procedure has a model in the Mass. R. A. P. and follows, for the most part, the cognate provisions in those rules. It is the most detailed and costly method of appeal to the Appellate Division, but may be necessary if the issues are complex or if there is a dispute as to what the issues are or how they arose.

In general, this rule differs from its counterpart, Mass. R. A. P. 8, in that it focuses on the electronic tape recording of the proceeding (which is required in the District Court) as the source of the transcript, rather than a stenographic record.

Section (a) of the rule differs greatly from its Mass. R. A. P. counterpart. Unlike the latter, this rule does not define a “record of appeal” consisting of the original papers, exhibits, transcript, if any, and certified docket entries. Providing those documents to the Appellate Division is addressed in various provision of this rule, as necessary, most notably Rule 18(a). Rather this rule focuses on the “record of proceedings” i.e., the transcript (usually from the tape recording) or a statement of evidence or proceedings when no transcript is available.

As stated in section (a), no transcript will be necessary for appeal under Rule 8C if the issue on appeal is based solely on the pleadings. Such a case would appear appropriate for appeal under

Rule 8A. If the appellant attempted a Rule 8A appeal but the appellee objected, such objection may be the subject of a motion for costs under Rule 26. See Rule 8A(b).

It should be noted that under section (b) of the rule the time limit for claiming this method of appeal is thirty days from filing the notice of appeal or from termination of either of the other methods of appeal. And the document by which appeal is claimed, the “Appeal on the Record of Proceedings” must include a proper request under section (c) for a cassette copy of the tape (unless such request was included with the notice of appeal).

The next step in the process under section (c) is for the appellant to file and serve a “designation” of those portions of the taped record to be transcribed. The designation must be filed and served (1) within fifteen days of the filing of the “Appeal on Record of Proceedings” if the tape was previously ordered and obtained, or (2) within fifteen days after the cassette copy is received, if it is ordered in the “Appeal on Record of Proceedings.”

The requirements for the designation under section (c) are many and detailed. They closely follow the parallel provisions of the Mass. R. A. P. where a transcript must be obtained from a tape recording (Rule 8(b)(3)(ii)). As in the latter rule, if the appellant designates the entire cassette for transcript, he or she must send the cassette to the transcriber within the same fifteen days as for filing and serving the designation, with an order to transcribe the entire cassette. Note, however, that under this rule, the fifteen-day period may commence from the time the Appeal on Record of Proceedings was filed (if the cassette was not previously ordered in the notice of appeal) or from the time the cassette was made available (if it was requested in the Appeal on Record of Proceedings).

The time limit for sending an order for transcription of less than the entire cassette is the same as in the Mass. R. A. P.: The cassette and order must be promptly sent or delivered to the transcriber “after twenty days have expired from the service upon the appellee of appellant’s designation of transcript.” The appellee may designate additional portions under section (c)(2).

As in Mass. R. A. P. 8, the order to the transcriber must include the number of copies to be sent to the appellant and a copy of the order must be filed and served.

Note that under sections (c)(2) and (d) of the rule, the trial court can impose terms and costs if it has to order the appellant to order transcriptions of additional parts of the record that the appellee has designated.

Succeeding sections of the rule also follow parallel provisions of the Mass. R. A. P. regarding payment by the appellant to the transcriber, the duties of the appellee, the duties of the transcriber, unintelligible portions of the cassette, obtaining a “statement of the evidence or proceedings” when no transcript is available, and correcting or modifying the record of proceedings.

Section (d) provides the procedure to be followed in the unusual event that the proceedings were recorded by a court-approved stenographer. It differs from the cognate rule in the Mass. R. A. P. (Rule 8(b)(1)) by measuring time limits from the filing of the “Appeal on the Record of Proceedings” and by allowing the court to decide what portions to transcribe if there is a dispute



and impose terms and costs thereon. A 2013 amendment to this rule deleted the citation in section (d) to the District/Municipal Court rules of Civil Procedure, which were repealed in 1996, and replaced it with a citation to the Massachusetts Rules of Civil Procedure, which now govern civil proceedings in the District Court.

Section (g) of the rule requires the appellant to file six copies of the Appeal on the Record of Proceedings after the original transcript has been received by the clerk from the transcriber and the parties so notified. When the clerk receives these six copies, the case is sent to the Appellate Division. This procedure differs substantially from the Mass. R. A. P., where the case cannot be transmitted to the Appellate Division until the clerk has completed the “assembly of the record.” As discussed in the Commentary to Rule 9, below, assembly of the record is not required under these rules.

Also note that under this rule briefs are not filed in the trial court. Rather, briefs are filed in the Appellate Division after the case is received there. See Rule 19(a). This differs from appeal under Rules 8A or 8B where briefs must be filed in the trial court before the case is sent to the Appellate Division.