

# **Supreme Judicial Court Standing Advisory Committee on the Rules of Appellate Procedure**

## **Proposed amendments to Rules 10 and 29**

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- p. 1    Current text of Mass. R. App. P. 10(c)**
  - p. 2    Proposed amendments to Mass. R. App. P. 10(c) - redline version**
  - p. 2    Proposed amendments to Mass. R. App. P. 10(c) – clean version**
  - p. 2    DRAFT Reporter's Notes for Rule 10**
  - p. 3    Current text of Mass. R. App. P. 29**
  - p. 4    Proposed amendments to Mass. R. App. P. 29 - redline version.**
  - p. 6    Proposed amendments to Mass. R. App. P. 29 – clean version**
  - p. 8    DRAFT Reporter's Notes for Rule 29**
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### **[Current text of Mass. R. App. P. 10(c)]**

#### **Rule 10: Docketing the Appeal**

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**(c) Dismissal for Failure of Appellant in a Civil Case to Comply With Rule 9(d) or Rule 10(a).** If any appellant in a civil case shall fail to comply with Rule 9(d) or Rule 10(a)(1), the lower court may, on motion with notice by any appellee, dismiss the appeal, but only upon a finding of inexcusable neglect; otherwise, the court shall enlarge the appellant's time for taking the required action. If, prior to the lower court's hearing such motion for noncompliance with Rule 9(d), the appellant shall have cured the noncompliance, the appellant's compliance shall be deemed timely.

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## [Proposed amendments to Mass. R. App. P. 10(c) - redline version]

### Rule 10: Docketing the Appeal

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(c) ~~Reserved~~~~Dismissal for Failure of Appellant in a Civil Case to Comply With Rule 9(d) or Rule 10(a).~~ If any appellant in a civil case shall fail to comply with Rule 9(d) or Rule 10(a)(1), the lower court may, on motion with notice by any appellee, dismiss the appeal, but only upon a finding of inexcusable neglect; otherwise, the court shall enlarge the appellant's time for taking the required action. If, prior to the lower court's hearing such motion for noncompliance with Rule 9(d), the appellant shall have cured the noncompliance, the appellant's compliance shall be deemed timely.

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## [Proposed amendments to Mass. R. App. P. 10(c) – clean version]

### Rule 10: Docketing the Appeal

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(c) Reserved

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## DRAFT Reporter's Notes—2024

In 2024, Rules 10 and 29 were amended at the same time. The title and text of Rule 10(c) were deleted and its provisions were incorporated into the amended Rule 29, so that all provisions regarding dismissal of appeals are now contained within Rule 29.

## **[Current text of Mass. R. App. P. 29]**

### **Rule 29: Voluntary Dismissal of Appeal or Other Proceeding**

**(a) Voluntary Dismissal in the Lower Court.** Before an appeal has been docketed in the appellate court, the lower court may dismiss the appeal on the filing of a stipulation signed by all the parties or on the appellant's motion with notice to all parties.

#### **(b) Voluntary Dismissal in the Appellate Court.**

**(1) Civil Cases.** If the parties to a civil appeal or other civil proceeding shall sign and file with the clerk of the appellate court a stipulation or motion that the proceeding be dismissed with prejudice, specifying the terms as to payment of costs and attorney's fees, and shall pay whatever fees are due, the clerk shall enter the case as dismissed. An appeal may be dismissed on motion of the appellant on such terms as may be agreed upon by the parties or fixed by the court.

**(2) Criminal Cases.** A criminal appeal or other criminal proceeding may be dismissed by the appellate court on motion of the appellant, and the clerk shall enter the case as dismissed. If the appellant is the defendant, the motion shall include an affidavit by the defendant, or an attestation by counsel, that the defendant assents to the court's dismissal of the appeal with prejudice. If the motion states that the appeal is moot, an affidavit by the defendant is not required.

**(c) Settlement; Obligation of Appellant.** In the event a case is settled or otherwise disposed of while an appeal is pending, it shall be the duty of the appellant to notify the clerk of the appellate court forthwith.

**(d) Notice to Lower Court.** The clerk of the appellate court shall promptly notify the clerk of the lower court whenever an appeal is dismissed pursuant to this rule.

## [Proposed amendments to Mass. R. App. P. 29 - redline version]

### Rule 29: Voluntary and Involuntary Dismissal ~~of Appeal or Other Proceeding~~

(a) Voluntary ~~D~~dismissal in the ~~L~~lower ~~C~~court. Before an appeal has been docketed in the appellate court, the lower court may dismiss the appeal on the filing of a stipulation signed by all the parties or on the appellant's motion with notice to all parties.

(b) Voluntary ~~D~~dismissal in the ~~A~~ppellate ~~C~~court.

(1) Civil ~~C~~ases. If the parties to a civil appeal or other civil proceeding shall sign and file with the clerk of the appellate court a stipulation or motion that the proceeding be dismissed with prejudice, specifying the terms as to payment of costs and attorney's fees, and shall pay whatever fees are due, the clerk shall enter the case as dismissed. An appeal ~~may~~shall be dismissed on motion of the appellant on such terms as may be agreed upon by the parties or fixed by the court.

(2) Criminal ~~C~~ases. A criminal appeal or other criminal proceeding may be dismissed by the appellate court on motion of the appellant, and the clerk shall enter the case as dismissed. If the appellant is the defendant, the motion shall include an affidavit by the defendant, or an attestation by counsel, that the defendant assents to the court's dismissal of the appeal with prejudice. If the motion states that the appeal is moot, an affidavit by the defendant is not required.

(~~e~~3) Settlement; ~~O~~bligation of ~~A~~ppellant. In the event a case is settled or otherwise disposed of while an appeal is pending, it shall be the duty of the appellant to notify the clerk of the appellate court forthwith.

### (c) Involuntary dismissal in the lower court; reinstatement.

(1) Dismissal. After the timely filing of a notice of appeal but prior to docketing of the appeal in the appellate court, the lower court on its own motion or in response to a party's motion may involuntarily dismiss the appeal only if the appellant or cross-appellant fails to timely comply with the transcript requirements of Rule 8 or record-assembly requirements of Rule 9 (d), or timely docket a civil appeal under Rule 10 (a) (1). The lower court shall promptly notify the parties that the appeal may be dismissed unless the deficiency is remedied within 21 days after the date of the notice of deficiency. If the deficiency is not remedied within that time, the lower court may dismiss the appeal or take such other action as deemed appropriate.

(2) Reinstatement.

(i) Civil cases. Within 14 days after entry of an order of dismissal, the appellant or cross-appellant may file in the lower court a motion for reinstatement of the appeal upon a showing of excusable neglect and a meritorious appeal.

(ii) Criminal and court appointed non-criminal cases. After entry of an order of dismissal, the defendant in a criminal case, or appellant or cross-appellant in any other proceeding in which counsel is required to be made available to such party pursuant to Supreme Judicial Court Rule 3:10, may file in the lower court a motion for reinstatement of the appeal upon a showing of either the existence of a meritorious appeal or an act or omission of counsel which deprived the defendant of the right to appeal.

**(d) Involuntary dismissal in the appellate court; reinstatement.**

(1) Dismissal. After docketing of the appeal in the appellate court, if the appellant or cross-appellant fails to prosecute its appeal within the periods of time set forth in Rule 19 or any enlargement, or otherwise comply with a court order or these rules insofar as necessary to prosecute the appeal, the appellate court may enter an order of intent to dismiss the appeal for lack of prosecution if the appellant or cross-appellant does not remedy the deficiency within a period of time set by the court. The appellate court may also, on its own motion with notice to the parties or on motion of a party, dismiss an appeal at any time for mootness, lack of jurisdiction, or any other reason provided by law.

(2) Reinstatement. Any order of dismissal for failure to prosecute shall be subject to a motion to vacate the dismissal or to reinstate the appeal, filed in the appellate court in accordance with such procedures as the appellate courts may establish.

**(e) Notice to Lower Court.** The clerk of the appellate court shall promptly notify the clerk of the lower court whenever an appeal is dismissed pursuant to this rule.

# **[Proposed amendments to Mass. R. App. P. 29 - clean version]**

## **Rule 29: Voluntary and Involuntary Dismissal**

**(a) Voluntary dismissal in the lower court.** Before an appeal has been docketed in the appellate court, the lower court may dismiss the appeal on the filing of a stipulation signed by all the parties or on the appellant's motion with notice to all parties.

### **(b) Voluntary dismissal in the appellate court.**

**(1) Civil cases.** If the parties to a civil appeal or other civil proceeding shall sign and file with the clerk of the appellate court a stipulation or motion that the proceeding be dismissed with prejudice, specifying the terms as to payment of costs and attorney's fees, and shall pay whatever fees are due, the clerk shall enter the case as dismissed. An appeal shall be dismissed on motion of the appellant on such terms as may be agreed upon by the parties or fixed by the court.

**(2) Criminal cases.** A criminal appeal or other criminal proceeding may be dismissed by the appellate court on motion of the appellant, and the clerk shall enter the case as dismissed. If the appellant is the defendant, the motion shall include an affidavit by the defendant, or an attestation by counsel, that the defendant assents to the court's dismissal of the appeal with prejudice. If the motion states that the appeal is moot, an affidavit by the defendant is not required.

**(e3) Settlement; obligation of appellant.** In the event a case is settled or otherwise disposed of while an appeal is pending, it shall be the duty of the appellant to notify the clerk of the appellate court forthwith.

### **(c) Involuntary dismissal in the lower court; reinstatement.**

**(1) Dismissal.** After the timely filing of a notice of appeal but prior to docketing of the appeal in the appellate court, the lower court on its own motion or in response to a party's motion may involuntarily dismiss the appeal only if the appellant or cross-appellant fails to timely comply with the transcript requirements of Rule 8 or record-assembly requirements of Rule 9 (d), or timely docket a civil appeal under Rule 10 (a) (1). The lower court shall promptly notify the parties that the appeal may be dismissed unless the deficiency is remedied within 21 days after the date of the notice of deficiency. If the deficiency is not remedied within that time, the lower court may dismiss the appeal or take such other action as deemed appropriate.

**(2) Reinstatement.**

**(i) Civil cases.** Within 14 days after entry of an order of dismissal, the appellant or cross-appellant may file in the lower court a motion for reinstatement of the appeal upon a showing of excusable neglect and a meritorious appeal.

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**(1) Dismissal.** After docketing of the appeal in the appellate court, if the appellant or cross-appellant fails to prosecute its appeal within the periods of time set forth in Rule 19 or any enlargement, or otherwise comply with a court order or these rules insofar as necessary to prosecute the appeal, the appellate court may enter an order of intent to dismiss the appeal for lack of prosecution if the appellant or cross-appellant does not remedy the deficiency within a period of time set by the court. The appellate court may also, on its own motion with notice to the parties or on motion of a party, dismiss an appeal at any time for mootness, lack of jurisdiction, or any other reason provided by law.

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**(e) Notice to lower court.** The clerk of the appellate court shall promptly notify the clerk of the lower court whenever an appeal is dismissed pursuant to this rule.

## DRAFT Reporter's Notes—2024

Rule 29 was substantially revised in 2024 to add provisions regarding involuntary dismissal of appeals. No changes of substance were made to the existing provisions regarding voluntary dismissal of appeals. Stylistic and formatting changes were made for clarity, consistency, and simplicity and were not intended to change the substance of the rule. For example, the provisions regarding voluntary dismissal of appeal that were previously set forth in subsections (a) to (d) are now in subsections (a) to (b).

New subsection (c) was added to govern involuntary dismissal and reinstatement of civil and criminal appeals in the lower court. It replaced and clarified the language regarding dismissal of civil appeals formerly contained in Rule 10 (c). Rule 10 was simultaneously amended in 2024 to remove subsection (c).

New subsection (c) in Rule 29 clarified that the circumstances in which a lower court may involuntarily dismiss an appeal are very circumscribed. The limited bases for dismissal mirror the lower court's limited scope of authority regarding appeals: enforcing the steps required prior to the appeal being docketed in the appellate court. Those pre-docketing requirements are set forth in Rules 8, 9, and 10.

In cases where an appellant or cross-appellant fails to comply with those requirements, or a relevant court order, Rule 29 (c) (1) clarified the enforcement mechanism available to the lower court. The lower court notifies the parties of intent to dismiss the appeal. An appellant or cross-appellant is provided 21 days to cure the deficiency after the lower court's notice or face dismissal. The amendment also provided the lower court with discretion to take other steps to address the failure to diligently pursue an appeal or cross-appeal.

Of note, new subsection (c) uses the phrase “fails to timely comply” with the applicable rules of appellate procedure, rather than the more generic “failure to prosecute” language. This phrasing was intentional, to incorporate the body of law developed under former Rule 10 regarding dismissal of civil appeals, rather than the body of law regarding involuntary dismissal of civil matters for failure to prosecute at trial. Compare *Monahan v. Washburn*, 400 Mass. 126, 128–29 (1987) (involuntary dismissal “erroneously Draconian” where good cause existed for requested continuance) with *Russell v. McOwen-Hanelt*, 413 Mass. 106, 108–09 (1992) (uncured failure to comply with Rule 9 (c) warranted dismissal).

New subsection (c) (2) was added to establish a procedure for reinstatement of appeals in the lower courts after an order of involuntary dismissal. The standards for reinstatement in the lower courts hew closely to the standards for reinstatement in the appellate courts. New subsection (c) (2) (i) incorporated standards from the prior version of Rule 10 by allowing for reinstatement of a civil appeal upon a showing of both excusable neglect and a meritorious appeal. *Howard v. Bos. Water & Sewer Comm'n*, 96 Mass. App. Ct. 119, 123 (2019). New subsection (c) (2) (ii) requires a showing of either a meritorious appeal or an act or omission of counsel. See *Commonwealth v. Alvarez*, 69 Mass. App. Ct. 438, 443 (2007) (defendant actually or constructively denied right to appeal “is not to be subjected to a stricter standard of review; nor is he required to establish any colorable appellate issue as a prerequisite to recovering his lost

appellate rights”). Under either subsection, the required showing of “meritorious” is not onerous. See *L.B. v. Chief Just. of Prob. & Fam. Ct. Dep’t*, 474 Mass. 231, 242 & n.17 (2016). “[A] showing of a meritorious issue requires an appellant to show not that he would necessarily prevail but, rather, that the issue ‘presents a question of law deserving judicial investigation and discussion.’” *Howard*, 96 Mass. App. Ct. at 123, quoting *Tisei v. Bldg. Inspector of Marlborough*, 3 Mass. App. Ct. 377, 379 (1975).

Additionally, new subsection (c) (2) (ii) applies to all cases in which a right to counsel attaches, such that an appellant or cross-appellant could raise a claim of ineffective assistance of counsel for allowing the appeal to be dismissed.

New subsection (d) clarified that once an appeal has entered on the docket of an appellate court, involuntary dismissal of that appeal, the curing of any deficiencies, and any reinstatement, is governed by procedures established by that appellate court through standing orders or rules. At the time of the 2024 amendment, the Supreme Judicial Court utilized a standing order regarding dismissals for lack of prosecution. The Appeals Court’s procedures were contained in M.A.C. Rule 19.0.