

REPORTER'S NOTES

MASSACHUSETTS RULES OF APPELLATE PROCEDURE

Rule 1. Scope of rules: definitions

Reporter's Notes--2021

The definition of “clerk” in Mass. R. A. P. 1(c) was amended to clarify that the procedure for obtaining review in the appellate division of the District Court or Boston Municipal Court is no longer restricted to the report procedure under now-repealed Rule 64 of the Dist./Mun. Cts. R. Civ. P. Review may be obtained by appeal or report. See Rules 1 and 5 of the Dist./Mun. Cts. R. A. D. A., and Mass. R. Civ. P. 64(b). The amendment added the words “appealed or.”

In addition, a technical amendment was made to the definition of "decision" in Rule 1(c) to reflect amendments made to the Appeals Court Rules in 2020. The reference to “Appeals Court Rule 1:28” was deleted and replaced with “M.A.C. Rule 23.0.”

Rule 19. Filing and serving of briefs, appendices, and certain motions

Reporter's Notes--2021

Technical amendments were made to Rule 19(d)(1)(A) and 19(d)(2)(A) to reflect amendments made to the Appeals Court Rules in 2020. The reference in each to “Appeals Court Standing Order Concerning Electronic Filing” was deleted and replaced with “M.A.C. Rule 13.0, concerning electronic filing.”

Rule 20. Form and length of briefs, appendices, and other documents

Reporter's Notes--2021

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) ("Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy"), but Rule 20(a)(1)(B) 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 Massachusetts appellate courts have traditionally accepted briefs, applications, and responses which contain 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 in a brief or application and promotes awareness of the option. The examples of permissible categories of "visual aids" described in the first sentence of Rule 20(a)(1)(B) are not intended to be exclusive. For example, a visual aid may also be a map, screenshot, or reproduction of text messages.

Subparagraphs (i)-(iii) of Mass. R. A. P. 20(a)(1)(B) 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 in which the visual aid appears or from which it 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 outside 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 categorized as impounded under Massachusetts law. *See* Mass. Trial Court Rule VIII, Uniform Rules on Impoundment Procedure, Rule 1(9) ("Impounded" information includes material that a statute, court rule, standing order, case law, or court order

designates must be withheld as 'impounded,' 'withheld from public inspection,' 'not available for public inspection,' 'segregated,' or 'confidential,' though these terms are not exhaustive."); S.J.C. Rule 1:15, § 2 (maintaining confidentiality of previously impounded cases on appeal).

Rule 20(a)(1)(B)(ii) also prohibits any visual aid that "depicts a minor, violence, death, or pornography[,], or is otherwise gruesome or indecent in nature." This provision is intended to facilitate public access to briefs. The appellate courts' websites post briefs filed in non-impounded cases. In such cases, the inclusion of visual aids in a filing that will be posted on the internet raises considerations involving personal and sensitive information or privacy interests. *Cf. Policy Statement by the Justices of the Supreme Judicial Court Concerning Publication of Court Case Information on the Web*, 1 (May 2003) ("This policy attempts to balance our dual interests in making information about the courts available and accessible, and in protecting personal and sensitive information from indiscriminate disclosure."). Rule 20(a)(1)(B)(ii) prohibits inclusion of graphic or disturbing visual aids to avoid the indiscriminate publication of such content and any need for the courts to restrict public web access to the filing solely because of a visual aid's nature or content. In addition, the rule is intended to protect minors and others with legitimate privacy interests. Images of any person or party, minor or adult, particularly of an identifiable facial image, are disfavored and should not be included in a brief, application, or response unless blurred or cropped, or unless the image or a person's appearance or identity is at issue on appeal. An unaltered visual aid must also be included in the record appendix. Finally, this provision serves to limit the inadvertent viewing of graphic or disturbing content. Advocates' briefs may still refer the justices to any visual aid contained in the record appendix.

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). Any alteration or change to an exhibit included as a visual aid in a brief, application or response must be clearly explained, such as, "Copy of Ex. 4, defendant's face blurred"; "Copy of Ex. 5, reduced in size"; "Copy of Ex. 6, minor's face blurred"; "Copy of Ex. 7, cropped to exclude victim's body"; or, "Copy of Ex. 8, arrow added to show contested portion."

The court may sua sponte or upon motion strike any material that is inappropriate or not in substantial compliance with the rules. *See* Mass. R. A. P. 16(k) & 20(a)(7).

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 "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.

Rule 27.1. Further appellate review

Reporter's Notes--2021

A technical amendment was made to Rule 27.1(b) to reflect amendments made to the Appeals Court Rules in 2020. The reference to "Appeals Court Rule 1:28" was deleted and replaced with "M.A.C. Rule 23.0."