COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT OF THE COMMONWEALTH

# SMALL CLAIMS STANDARDS

These Standards are designed for use with Trial Court Rule III, Uniform Small Claims Rules, effective January 1, 2002, in the District Court, Boston Municipal Court, and Housing Court Departments of the Trial Court.

Honorable Barbara A. Dortch-Okara
Chief Justice for Administration and Management

November, 2001

# FOREWORD

The Administrative Office of the Trial Court issues these Standards to assist judges, clerk-magistrates and other personnel of the District Court, Boston Municipal Court, and Housing Court Departments in implementing recently amended Trial Court Rule III, Uniform Small Claims Rules (effective January 1, 2002). The long delayed amendments to the Uniform Small Claims Rules were necessitated by amendments to G.L.c. 218, §§ 21-25, especially those authorizing clerk-magistrates to hear and decide small claims in the first instance, and by appellate decisions effecting procedural changes in small claims actions.

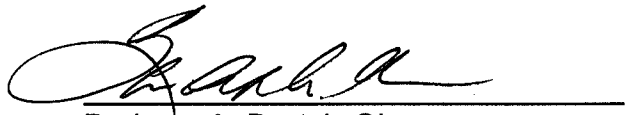
The goal of the Standards is two fold:

1. To expedite, consistent with applicable statutory and decisional law and court rules, the fair and efficient disposition of small claims in all Trial Court departments having jurisdiction of such actions; and
2. To promote confidence among litigants that their small claims will be processed expeditiously and impartially by the courts according to applicable rules and statutes and recognized Standards.

The Standards were carefully constructed by the Trial Court Committee on Small Claims Procedures to mesh with the amended Uniform Small Claims Rules and applicable appellate decisions. That Committee brought to its task a wealth of experience and insights gained from a variety of perspectives. In developing the Standards, the Committee also drew heavily upon the District Court Department's earlier Standards of Judicial Practice: Small Claims (1984).

The Standards not only reflect statutory amendments to the small claims process and recent appellate decisions, but they also emphasize those procedural improvements adopted as part of the recently amended Uniform Small Claims Rules. The most significant of these improvements is the provision for automatic payment hearings in place of the former cumbersome, expensive, and often time-consuming process for collecting on small claims judgments. In tests concluded prior to the amendment of the rules, this provision garnered enthusiastic support from judicial personnel as well as from practitioners and representatives of consumer advocacy and legal services programs.

I wish to thank all who have contributed to the adoption of the amended Uniform Small Claims Rules and to these companion Standards. Their contributions are of invaluable assistance to the administration of justice by the Trial Court and to the tens of thousands of litigants who resort annually to the Trial Court for the fair and expeditious resolution of their small claims.



Barbara A. Dortch-Okara
Chief Justice for Administration and Management

11/30/01
Date

TRIAL COURT COMMITTEE ON SMALL CLAIMS

PRACTICES AND PROCEDURES

The Trial Court Committee on Small Claims Practices and Procedures was appointed by Honorable John E. Fenton, Jr., Chief Justice for Administration and Management, in May, 1994 and submitted its interim report in February, 1995. Since then, the Committee, under the direction of Chief Justices for Administration and Management John J. Irwin, Jr. and Barbara A. Dortch-Okara, has labored to propose amendments to Trial Court Rule III, Uniform Trial Court Rules, and to develop these Standards to assist in the implementation of the amended Rules.

Most Recently, the Committee consisted of:

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|---|---|
| Honorable R. Peter Anderson, Chair | First Justice<br>Brighton District Court |
| James A. Bisceglia | Clerk-Magistrate<br>Worcester Housing Court |
| Sandra Caggiano | First Assistant Clerk-Magistrate<br>East Boston District Court |
| John R. Cavanaugh | Assistant Clerk-Magistrate for Civil Business<br>Boston Municipal Court |
| Harvey J. Chopp | Court Administrator<br>Housing Court Department |
| Lawrence E. O'Brien, Esquire | Ganick, O'Brien & Sarin<br>Dorchester |
| Andrew R. Quigley | First Assistant Clerk-Magistrate<br>Hingham District Court |

| | |
|---|---|
| Diane L. Szafarowicz | Assistant Attorney General<br>Consumer Protection & Anti-Trust<br>Division |
| Wendy A. Wilton | Clerk-Magistrate<br>Ayer District Court |

Former members of the Committee include:

| | |
|---|---|
| William T. Clark | Clerk-Magistrate<br>Gardner District Court |
| James. R. Gianelis | Assistant Clerk-Magistrate<br>Boston Municipal Court |
| Glenn Hannington, Esquire | Formerly Assistant Clerk-Magistrate<br>for Civil Business<br>Boston Municipal Court |
| Deirdre Cummings | Mass. Public Interest Research Group |

John F. Burke, Senior Staff Attorney of the Administrative Office of the Trial Court, provided assistance and support to the Committee throughout its activities. Others who assisted the Committee in its efforts include Michael J. Shea, Deputy Court Administrator and Legal Counsel, District Court Department; Ann A. Meagher and Brian T. Mulcahy, Legal Staff, Administrative Office of the Trial Court; Christine P. Burak and Barbara M. Diamond, staff of the Supreme Judicial Court; and Martha A. Coravos, Esquire.

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**GENERAL**
**STANDARDS 1:00 - 1:01**.

1:00 Purpose of the Standards.
1:01 Definitions.

## 1:00 PURPOSE OF THE STANDARDS.

**THESE STANDARDS REPRESENT RECOMMENDED PRACTICES FOR THE SMALL CLAIMS PROCEDURE IN THE BOSTON MUNICIPAL COURT, DISTRICT COURT, AND THE HOUSING COURT DEPARTMENTS OF THE TRIAL COURT. THEIR PURPOSE IS:**

1. **TO INCREASE THE EFFICIENCY AND EFFECTIVENESS OF THE SMALL CLAIMS PROCEDURE;**

2. **TO IMPROVE THE PROCESS BY WHICH SMALL CLAIMS JUDGMENTS ARE SATISFIED WHILE RESPECTING THE DUE PROCESS RIGHTS OF DEFENDANTS;**

3. **TO MAKE SMALL CLAIMS PROCEDURES UNIFORM THROUGHOUT THE COMMONWEALTH AND MORE ACCESSIBLE TO ALL;**

4. **TO EXPAND COMMUNITY AWARENESS AND UNDERSTANDING OF THE SMALL CLAIMS PROCESS.**

### COMMENTARY

The stated goal of Massachusetts small claims procedure is to provide a simple, prompt, informal, and inexpensive mechanism for the resolution of monetary disputes in which damages do not exceed a specific dollar value. G.L. c. 218, s. 21; McLaughlin v. Levenbaum, 248 Mass. 170, 175-176, (1924). In Fiscal Year 1996, small claims related filings comprised 44% of all civil filings in the Boston Municipal Court, the District Court, and the Housing Court Departments of the Trial Court, the courts with jurisdiction over small claims. Annual Report on the State of Massachusetts Court System, Fiscal Year 1996. For many citizens, the only direct contact with the courts may be their participation in a small claims case. For these individuals, their perception of the fairness and efficiency of the court system will be shaped by the quality of their experience in the small claims session. If small claims litigants find the process understandable and the court personnel helpful and courteous, and if they achieve a result without spending too much time or money, they are likely to think well of the courts and feel they have received justice even if they may not prevail. If, on the other hand, litigants find the small claims process difficult to comprehend and seemingly arbitrary and capricious, if they are not treated with dignity and courtesy, if they wait months for hearings and have to spend more time and effort than the case is worth to collect a judgment, they will think ill of the courts and buy into the most negative stereotypes about a broken judicial system.

Small claims court is intended to be "The People's Court," to borrow the title of the popular television show. It is the responsibility of the Trial Court to make this so. The small claims experience is different from other court proceedings because litigants, other than commercial litigants, generally appear without lawyers and therefore do not benefit from the mediating function attorneys perform in the judicial process. Trial Court personnel should recognize this fact and make

every effort to assist small claims litigants as they try to navigate the unfamiliar territory of the clerk-magistrate's office and the courtroom on their own.

These Standards are recommendations intended to implement the small claims statute, G.L. c. 218, ss. 21-25 (reproduced as Appendix A) and the Uniform Small Claims Rules (Trial Court Rule III, reproduced as Appendix B).

**1:01 DEFINITIONS.**

**A. COURT: EXCEPT WHERE USED TO REFER TO A PARTICULAR DIVISION OF A DEPARTMENT OF THE TRIAL COURT, THE TERM MEANS THE ADJUDICATOR, AND IS INCLUSIVE OF CLERK-MAGISTRATE, ASSISTANT CLERK-MAGISTRATE, AND JUDGE.**

**B. APPEAL: REFERS TO THE SUBSEQUENT TRIAL BEFORE A JURY OF SIX OR A JUDGE WITHOUT A JURY GUARANTEED BY G.L. c. 218, s. 23.**

## COURT STRUCTURE
## STANDARDS 2:00 - 2:06.

2:00 Accessibility of the Court.

2:01 Organization of the Clerk-Magistrate's Office.

2:02 Specialized Personnel.

2:03 Adjudication and Certification.

2:04 Periodic Review of the Small Claims Procedure.

2:05 Provision of Interpreters for Individuals Not Fully Conversant with English and Hearing-Impaired Individuals.

2:06 Reasonable Accommodations for Persons with Disabilities.

## 2:00 ACCESSIBILITY OF THE COURT.

**COURT PERSONNEL SHOULD FACILITATE THE USE OF THE SMALL CLAIMS PROCEDURE BY THE PUBLIC.**

COMMENTARY

Courts are encouraged to explore means of publicizing the small claims process. The use of simple and inexpensive measures (such as a letter from the presiding justice or the clerk-magistrate to local public service agencies and public institutions describing the procedure) will help overcome the lack of public awareness and enhance the effectiveness of the small claims procedure.

Conspicuous signs should be posted near courthouse entrances directing the small claims litigant to the proper office. See Standard 2:01. On days when small claims sessions are held, signs should be posted to direct small claims litigants to the appropriate courtroom. The small claims section of the clerk-magistrate's office should make copies of the Uniform Small Claims Rules and other relevant instructions and/or information available for public reference.

Court employees should provide general guidance and information to potential small claims litigants, but should take care not to place themselves in the position of advocating or appearing to advocate a particular litigant's position on the merits of the small claims case. *Opinion No. 95-6 of the Advisory Committee on Ethical Opinions for Clerks of Courts*, Supreme Judicial Court, November 8, 1995, reproduced as Appendix C; Uniform Small Claims Rule 2, as recently amended. Court personnel in the clerk-magistrate's office may, in appropriate situations, suggest that a potential plaintiff or complainant consider a small claim as a "simple, informal and inexpensive" (G.L. c. 218, s. 21) alternative to a full-fledged lawsuit or criminal complaint, but should leave the decision to the litigant. Standard court procedures may be summarized in written form and made available to litigants.

Court personnel have special statutorily-mandated responsibilities regarding accessibility for non-English speaking litigants and litigants with disabilities. See Standards 2:05 and 2:06 for a full discussion of these issues. Court personnel should make every effort to be helpful to non-English speaking litigants or litigants with disabilities, but should take care that in their effort to be helpful they do not advocate, or appear to advocate, a particular litigant's position on the merits of the claim. Court personnel should be aware that some litigants may mistake courtesy in providing information as support for the litigant's claim.

## 2:01 ORGANIZATION OF THE CLERK-MAGISTRATE'S OFFICE.

**EACH COURT SHOULD ESTABLISH A WELL-MARKED SMALL CLAIMS SECTION.**

COMMENTARY

Those of us who work daily with legal terminology and routinely deal with members of the bar and law enforcement personnel may not fully appreciate the confusion, uncertainty, and uneasiness a first experience with a court may evoke in a lay litigant. Since the clerk-magistrate's office is generally the first point of contact with the courts for those who use the small claims procedure, the importance of providing a customer-friendly atmosphere in that office cannot be overstated.

One way the clerk-magistrate's office can be more responsive to the needs of lay litigants is to locate the personnel responsible for processing small claims actions in office space apart from the civil, criminal, and cashier sections. In those courts where funds and facilities permit, a separate space within the clerk-magistrate's office or a separate room for the small claims section, apart from the main clerk-magistrate's office, is suggested. Signs indicating the location of the small claims section should be conspicuously posted.

If space and resources do not permit a separate small claims area, signs should be posted that clearly identify the court employee(s) in charge of small claims and the appropriate line for the small claims litigant to stand in. Small claims litigants should not have to endure a lengthy wait at a front counter only to be referred elsewhere. Since the hurried atmosphere of a front counter is only likely to increase the confusion and frustration of lay litigants, they should be referred to a knowledgeable person in the small claims section for any but the simplest questions. In those courts that employ a single counter person to furnish general information and forms, that employee may distribute small claims forms as well.

The small claims section should maintain an index of small claims actions, arranged alphabetically by name of defendant. This index should be available to the public upon request, but a procedure should be established that allows public access without unduly disrupting the orderly operation of the clerk-magistrate's office. Persons who routinely request access to large numbers of cases at a time should be required to make prior arrangements with the small claims assistant clerk-magistrate or the small claims supervisor. At no time should these persons be allowed behind the counter to search the index files, as such liberties may create the impression of one party having an unfair advantage over another.

## 2:02 SPECIALIZED PERSONNEL.

**THE SMALL CLAIMS SECTIONS SHOULD BE SUPERVISED BY AN ASSISTANT CLERK-MAGISTRATE OR SMALL CLAIMS SUPERVISOR AND SHOULD BE STAFFED BY SPECIALLY DESIGNATED CLERICAL PERSONNEL WHERE POSSIBLE.**

COMMENTARY

Where numbers of personnel permit, one assistant clerk-magistrate should be given administrative responsibility for the operation of the small claims section. If numbers do not permit, one clerical employee of appropriate title and experience should be designated as the small claims supervisor. The small claims assistant clerk-magistrate or small claims supervisor should supervise any clerical personnel involved in small claims matters and oversee the general processing of small claims cases. Other court personnel should direct all inquiries and complaints regarding small claims to the small claims assistant clerk-magistrate or the small claims supervisor.

The small claims assistant clerk-magistrate or the small claims supervisor, if qualified, should routinely act as courtroom clerk for the small claims session. This person should be responsible for reviewing the list of scheduled cases, calling the small claims list in the courtroom, and otherwise assisting the clerk-magistrate, assistant clerk-magistrate, or judge assigned to adjudicate small claims cases.

In those courts with available funds and sufficient small claims business, one or more clerical employees should be designated to work primarily with small claims. These employees should be afforded whatever small claims training is available and should be regularly apprised of changes in small claims procedures and practices. In those courts with insufficient small claims business to justify a clerical employee assigned solely to small claims, the responsibility for dealing with telephone or in-person inquiries about small claims should be designated to a specific employee whenever possible. This arrangement will provide continuity of contact for litigants and will also allow the designated employee to develop expertise in small claims.

All courts should have back-up clerical employees who are trained in small claims practices and are capable of assuming responsibility for the processing of small claims should the "primary" small claims employee be on vacation, out sick, or otherwise unavailable.

To avoid any problems that may arise in the handling of money, court personnel should not accept any payments from small claims debtors for transmittal to creditors *unless* a judge or a clerk-magistrate or an assistant clerk-magistrate has issued an order stating that payment must be made through the court. Uniform Small Claims Rule 7(g).

**2:03 ADJUDICATION.**

**CLERK-MAGISTRATES WHO ARE QUALIFIED BY EDUCATION OR TRAINING SHOULD BE PRIMARILY RESPONSIBLE FOR THE ADJUDICATION OF SMALL CLAIMS MATTERS, INCLUDING PAYMENT HEARINGS AND MOTIONS. JUDGES MAY HEAR THESE MATTERS WHEN DEEMED NECESSARY BY THE COURT AND THE DEFENDANT ELECTS TO WAIVE THE RIGHT TO APPEAL FOR A SUBSEQUENT TRIAL BY A JUDGE OR BEFORE A JURY.**

COMMENTARY

Small claims matters should primarily be heard in the first instance by clerk-magistrates and assistant clerk-magistrates. Judges however, may adjudicate cases when needed in any particular court but only in cases where the defendant (including a defendant in counterclaim or in any third party claim) elects to proceed with an initial trial by a judge and thereby agrees to waive any right to appeal for a subsequent trial by a judge or before a jury. Uniform Small Claims Rule 7(d); Trust Insurance Company v. Bruce at Park Chiropractic Clinic, 403 Mass. 607 (1/20/00). The court should have the defendant sign a written waiver of appeal rights before the case is assigned to a judge. Clerk-magistrates and assistant clerk-magistrates have the authority to try and to decide cases, to preside at payment hearings, and to decide motions. Uniform Small Claims Rule 7(d), as recently amended; Trust Ins. Co., supra, at 608, n.2, and 610. Hearings on contempt should be referred to a judge whenever there is the possibility of incarceration. Uniform Small Claims Rule 9(b). (Note: On October 25, 2000, the Appeals Court decided Boat Maintenance & Repair Co. v. Lawton, ____ Mass. App. Ct. _____, in which that court determined that a clerk-magistrate had no authority to hear and decide a contested motion in a small claims action. However, in so deciding, the Appeals did not acknowledge the Supreme Judicial Court's earlier decision in Trust Ins. Co. v. Bruce at Park Chiropractic Clinic, supra.).

When there is no clerk-magistrate or assistant clerk-magistrate qualified to adjudicate small claims for a particular Trial Court division, either a judge sitting in that division, if the defendant has waived appellate rights, or a clerk-magistrate or assistant clerk-magistrate from another division should be assigned to hear small claims in that division.

Because it is important that small claims actions be decided according to substantive law, clerk-magistrates and assistant clerk-magistrates should attend an educational program addressing both procedural and substantive law. See G.L. c. 218, s. 21; Canon 7 of the Code of Professional Responsibility for Clerks of the Courts. This program will be developed and provided by the Judicial Institute of the Trial Court and approved by the Chief Justice for Administration and Management. The education and training requirements are not meant to limit the inherent powers of the Chief Justice for Administration and Management, departmental chief justices, first justices, or clerk-magistrates to assign any clerk-magistrate or assistant clerk-magistrate to adjudicate small claims matters even though qualified by education or training.

## 2:04 PERIODIC REVIEW OF THE SMALL CLAIMS PROCEDURE.

**EACH DIVISION OF THE TRIAL COURT HEARING SMALL CLAIMS SHALL REGULARLY REVIEW THE OPERATION OF THE SMALL CLAIMS PROCEDURE AND SHALL MAKE A QUARTERLY REPORT TO ITS DEPARTMENTAL CHIEF JUSTICE.**

COMMENTARY

The first justice and the clerk-magistrate of each division of the Trial Court hearing small claims should meet regularly to discuss the overall operation of the small claims procedure. The small claims assistant clerk-magistrate and/or the small claims supervisor should also attend these meetings and a mechanism should be developed to ensure their input in the event that they are unable to attend.

The agenda of this meeting should include, among other things (1) a discussion of whether any backlog in hearings and/or paperwork is developing and, if so, what should be done to alleviate it; and (2) a consideration of whether scheduling changes for the small claims session are desirable. In addition, any complaints and suggestions received from litigants regarding the small claims process should be reviewed. While *ex parte* contacts between interested parties and the judges or clerk-magistrates or assistant clerk-magistrates who have adjudicated their cases are not appropriate, courts should develop some mechanism to solicit feedback from those who have experienced the small claims session firsthand. The small claims assistant clerk-magistrate or small claims supervisor should be encouraged to record complaints and suggestions from litigants and to share these comments, as well as their own day-to-day observations of the problems and successes they have encountered while administering small claims, with their departmental Administrative Office.

Each division of the Trial Court hearing small claims shall make a quarterly report to their departmental chief justice, and where applicable, to the regional administrative justice. This report should state the average time elapsed between the filing of a small claim and a first hearing, and the average time elapsed between a judgment and any payment hearing. The period of elapsed time should not exceed *8 weeks* from the filing to hearing or *6 weeks* from judgment to payment hearing.

If the averages in any particular court exceed 8 weeks from the filing to hearing or 6 weeks from judgment to payment hearing, or if the departmental chief justice or regional administrative justice learns that a particular court is having problems processing or disposing of small claims cases expeditiously, the departmental chief justice or regional administrative justice should require the presiding justice and clerk-magistrate of that court to submit a case flow management plan.

The case flow management plan should outline steps for bringing the court within the acceptable time periods and include a timetable for compliance. It should propose specific measures, such as increasing the number of days each week that small claims are heard, increasing the number of cases scheduled per day, or using judges or clerk-magistrates from other courts until the court can conform to the average time periods. The plan should also address the court's management structure as it

relates to small claims, including issues of accountability and the training and cross-training of clerical employees. (In some courts, for example, one factor contributing to a backlog is the lack of back-up employees who can process small claims when the employee designated to handle small claims is absent. See Standard 2:02.)

As individual courts review and respond to problems they have encountered in the small claims process, particular care should be taken not to vary those practices and forms that the Uniform Small Claims Rules and G.L. c. 218, ss. 21-25 intend to be universal throughout the Trial Court. While individual courts will differ in their needs and resources, variations in basic procedures, forms, and fees should be avoided.

## 2:05 PROVISION OF INTERPRETERS.

**THE COURT MUST TAKE THE NECESSARY STEPS TO PROVIDE QUALIFIED INTERPRETERS TO PARTICIPANTS IN SMALL CLAIMS MATTERS WHO ARE NOT FULLY CONVERSANT IN ENGLISH OR WHO ARE HEARING-IMPAIRED.**

COMMENTARY

Section 2 of G.L. c. 221C accords participants in small claims cases who are not fully conversant in English the right to the assistance of a qualified interpreter throughout the proceedings. Under G.L. c. 221, s. 92A, a deaf or hearing-impaired person who is a party or a witness in a small claims case is entitled to the assistance of a person (or persons) qualified to interpret the proceedings. In addition to the state statutory right to the assistance of an interpreter, deaf or hearing-impaired people are also entitled to reasonable accommodations under the Americans with Disabilities Act. See Standard 2:06 for further discussion.

At whatever stage of a case court personnel become aware of the need for an interpreter, the court should grant a continuance and order an interpreter for the next scheduled date. The court should not require any litigant who is not fully conversant in English or any hearing-impaired litigant to go forward at a trial or any other significant event without a qualified interpreter. The court should not assume that friends or family members accompanying the litigant are proficient enough in English or sign language to serve as translators or interpreters.

In ordering interpreters for small claims cases, the court should follow the same procedures used to order interpreters for other cases.

Any court that routinely deals with persons of a particular language group should consider obtaining and dispensing translated versions of the instructions found on the small claims forms.

## 2:06 REASONABLE ACCOMMODATIONS FOR PERSONS WITH DISABILITIES.

**THE COURT MUST MAKE REASONABLE ACCOMMODATIONS TO MAKE THE SMALL CLAIMS PROCEDURE ACCESSIBLE TO PERSONS WITH DISABILITIES.**

COMMENTARY

The Massachusetts Trial Court is subject to the Americans with Disabilities Act. Accordingly, all participants in small claims cases are entitled to equal access to the court and to the services of the court, without regard to disability.

It is the responsibility of the Trial Court to provide reasonable accommodations in order to assure access. Reasonable accommodations include, but are not limited to, sound-amplifying devices for hearing-impaired litigants and tape recordings of small claims filing instructions for visually-impaired litigants.

It is the responsibility of each court to prominently display written material that will allow disabled persons to make their needs known. Such information should also be accessible to the visually-impaired in a taped format.

The Supreme Judicial Court has designated Ms. Marge Brown to coordinate all Trial Court efforts to comply with the Americans with Disabilities Act. Inquiries, requests, and complaints should be directed to:

Marge Brown, Deputy Commissioner of Probation
One Ashburton Place
Room 405
Boston, MA 02108
(617) 727-0260

**COMMENCING THE ACTION**
**STANDARDS 3:00 - 3.04.**


3:00 Advising Small Claims Litigants.

3:01 Statement of Small Claim: Contents.

3:02 Statement of Small Claim: Filing.

3:03 Filing Fees.

3:04 Scheduling the Case.

## 3:00 ADVISING SMALL CLAIMS LITIGANTS.

**PERSONNEL IN THE CLERK-MAGISTRATE'S OFFICE SHOULD PROVIDE NECESSARY AND HELPFUL PROCEDURAL INFORMATION TO SMALL CLAIMS LITIGANTS IN A PROMPT AND COURTEOUS MANNER.**

COMMENTARY

The only contact many individuals have with the courts may be a small claims experience. Their attitude toward the entire court system may depend in large part on the manner in which they are received by small claims personnel. The importance of dealing with small claims litigants in a prompt and courteous fashion cannot be overemphasized.

Court personnel should be sensitive to the fact that for many litigants filing or responding to a small claim is an emotionally difficult experience. Many small claims arise from personal or business dealings that have soured. Some litigants are highly emotional about their claim and may transfer their anger and frustration to court personnel. These situations call for great patience and tact. Techniques for defusing confrontations are recommended subjects for staff conferences and training sessions.

Court personnel should also realize that while they are intimately familiar with court practice and are accustomed to dealing with legal procedures on a day-to-day basis, many small claims litigants will find the most elementary legal matters to be bewildering. Court personnel should make every effort to answer all small claims inquiries in a helpful and patient manner.

Courts can facilitate the small claims experience by providing clear instructions to litigants. If time permits, the small claims assistant clerk-magistrate or appropriate clerical personnel should describe the small claims procedure. At the very least, small claims personnel should direct litigants to the general instructions on the claim form and be available for questions.

Plaintiffs should be informed that they must be prepared to prove their cases by a fair preponderance of the evidence. Both parties should be reminded of the importance of producing all witnesses, documents, pictures, or other evidence in support of their position at trial. Plaintiffs should also be made aware that they have no appeal from the decision of the court if their claims are not successful.

Court personnel should administer help in an even-handed manner and provide guidance and assistance in a way that is equitable to all parties to the proceeding. Court personnel may assist parties with procedural aspects of their small claims, but should not advise litigants as to the merits of a claim or defense or its likelihood of success or give any other legal advice. Court personnel should be aware that dispensing advice about the proper content and wording of claims and answers or offering litigants help in choosing the proper party to sue may inadvertently turn into inappropriate advocacy-oriented assistance. Such assistance violates Canons 4 and 5 of the Code

of Professional Responsibility for Clerks of Court and raises the risk that the litigant may incorrectly believe that he or she may rely upon such advice as if it were the advice of an attorney. See *Opinion No. 95-6 of the Advisory Committee on Ethical Opinions for Clerks of Courts*, Supreme Judicial Court, November 8, 1995, reproduced in Appendix C, and recently amended Uniform Small Claims Rule 2.

Small claims personnel may advise litigants that many public libraries have books on small claims practice and that many consumer agencies and groups offer assistance in filing small claims.

If the plaintiff or the court has doubts about the probable effectiveness of mailed service in a particular case, the plaintiff should be advised to contact the clerk-magistrate's office before the date of trial to learn whether service has been effected. See Standard 4:04.

## 3:01 STATEMENT OF SMALL CLAIM: CONTENTS.

**ALL SMALL CLAIMS MUST BE FILED ON THE UNIFORM "STATEMENT OF SMALL CLAIM AND NOTICE OF TRIAL" FORM. SMALL CLAIMS PERSONNEL SHOULD ASSIST THE CLAIMANT IN COMPLETING THIS FORM.**

### COMMENTARY

Small claims personnel should instruct the claimant that they must utilize the uniform Statement of Small Claim and Notice of Trial form to file their small claim. The uniform form is designed to be usable in all departments and divisions of the Trial Court with small claims jurisdiction. Individual courts should not "personalize" their stock copies, and no claim presented on the uniform form should be rejected because it is not accompanied by any locally-developed "pre-application" or supplementary form.

Plaintiffs should not be charged for copies of the Statement of Small Claim and Notice of Trial form. Courts should not hesitate when asked to distribute a reasonable supply of forms to community organizations and large commercial plaintiffs. (Courts should anticipate requests for such distributions in determining the quantity of forms to requisition from the Administrative Office of the Trial Court.)

Small claims personnel should assist plaintiffs in correctly filling out the Statement of Small Claim and Notice of Trial form. Since the multi-part form serves as notice to the defendant, it should be stressed that all copies must be legible. Plaintiffs should be encouraged to state their claim in "concise, untechnical language, but with particularity and comprehensiveness." Uniform Small Claims Rule 2. Plaintiffs should be advised that their statement of claim must be specific enough to place the defendant on fair notice as to what allegations he or she is required to defend.

Small claims personnel should advise plaintiffs that the defendant be identified as correctly as possible on the claim form, and that such identification must include the following information:

- In the case of an individual defendant, the full name and address of the defendant.

- In the case of a corporate defendant, its full legal name, and if known, the name and address of a corporate officer or agent, to aid in the enforcement of any payment order. Exact corporate names can be obtained from the Corporate Records Division of the Secretary of the Commonwealth, Room 1712, One Ashburton Place, Boston, MA 02114, (617) 727-9640.

- In the case of an unincorporated business (for example, a partnership), the name(s) of its owner(s) as well as the name under which business is conducted. The owner(s) of an unincorporated business can be learned from the city or town clerk where the company's offices are located. Local consumer groups will often assist consumer plaintiffs with this task.

- In the case of a trust, the full name and address of the trustee.

Small claims plaintiffs are not allowed to divide a single claim into multiple causes of action in order to get around the statutory limit on recovery or for any other reason. Bougiokas v. Moore, 58 Mass. App. Dec. 74 (N. Dist. 1976). The rule against claim-splitting, however, does not prevent a plaintiff from bringing multiple similar small claims, each within the statutory limit, where the basis of each is legally a separate claim. Boyd v. Jamaica Plain Co-operative Bank, 7 Mass. App. Ct. 153, 163-167, 386 (1979).

A 1995 amendment to G. L. c. 218, s. 23 provides, however, that a judgment in a small claims motor vehicle property damage case "shall not have a *res judicata*, collateral estoppel, or other preclusive effect on any other action arising out of the same cause of action."

## 3.02 STATEMENT OF SMALL CLAIM: FILING.

**THE CLERK-MAGISTRATE'S OFFICE SHALL ACCEPT ALL CLAIMS FOR FILING. THE PLAINTIFF SHOULD BE INFORMED IF A CLAIM EXCEEDS THE STATUTORY MAXIMUM OR IF VENUE IS IMPROPER. FILING BY MAIL SHOULD BE ENCOURAGED.**

COMMENTARY

Any person of legal age may file a claim in his or her own name as plaintiff. An attorney may file a claim for a client. In the spirit of small claims practice, one of a number of partners or joint plaintiffs acting for all should be permitted to file a claim for all, and an officer, manager, or local manager of a corporation acting for the corporation should be permitted to file a claim in the corporation's behalf. A person who represents that he or she is authorized to do so should be permitted to file a claim on behalf of another, but the identity of any surrogate should be noted on the Statement of Small Claim. See Standard 6:09.

Court personnel should appreciate that trips to the courthouse may be inconvenient, time-consuming, and costly for litigants. Telephone callers inquiring about the initiation of a claim should be informed that a claim may be filed by mail. Uniform Small Claims Rule 2. The court should only return mailed-in forms to the sender if necessary information is missing or if there is a serious deficiency in the Statement of Small Claim, i.e. not for minor drafting faults.

Claims in excess of the statutory limit may be accepted, but the plaintiff should be informed that bringing the matter as a small claim will waive any claim to such excess. A surrogate should not be permitted to waive another's excess claim. There is no statutory limit in automobile property damage tort claims brought under the procedure. For cases under the consumer protection statute, G.L. c. 93A, or the security deposit statute, G.L. c. 186, s.15B, only the base amount of the claim must be within the statutory limit. Hampshire Village v. District Court, 381 Mass. 148 (1980).

No small claim should be rejected for what the clerk-magistrate's office perceives as venue/jurisdictional problems. In the District Court and the Boston Municipal Court, venue is proper in the court where the *plaintiff* or *defendant* lives or has his or her usual place of business or employment. (Previously, venue was proper only where the *defendant* lived or had his or her usual place of business or employment.) Where a claim is against a residential landlord for a matter arising out of a tenancy, venue also exists where the property is located. G.L. c. 218, s. 21. The venue for the Housing Court is limited to where the property that is the subject of the small claim is located. G.L. c. 185C, s.3. If a defendant will not waive a defect in venue, G.L. c. 218, s. 21 permits a court to cure improper venue by transferring a small claim to the appropriate court, but obviously it is preferable to have proper venue initially. Accordingly, unless there is reason to believe the defendant will waive venue or if immediate filing is necessary to toll the statute of limitations, the clerk-magistrate's office should normally refer a plaintiff who has the wrong venue to the proper court and suggest that the claim be filed there.

If an inmate of a correctional facility seeks to file a claim, the Statement of Small Claim should be accepted, thereby tolling the statute of limitations. The prisoner should be informed that the matter will be heard when he or she notifies the court of his or her release. The defendant should be served and notified of the court's action. In appropriate circumstances, however, the court may permit the issuance of a writ of *habeas corpus* pursuant to G.L. c. 248, s. 25.

A claim against multiple defendants made out on separate Statement of Small Claim forms should be accepted for filing as a single claim even if that court's usual practice is to use a single form.

Small claims clerical personnel should prepare a docket form and index card for each small claim filed.

**3:03 FILING FEES.**

**THE PLAINTIFF SHALL PAY THE STATUTORY FILING FEE AND SURCHARGE UNLESS FOUND TO BE INDIGENT.**

COMMENTARY

The plaintiff, unless found to be indigent, shall pay the filing fee established by G.L. c. 218, s. 22 and the surcharge imposed by G.L. c. 262, s. 4(c) to the appropriate clerk-magistrate's office. The plaintiff should not be charged any fee for the blank Statement of Small Claim form itself, nor should a plaintiff who files a small claim by mail be charged for postage to send out his or her own copy of the Statement of Small Claim by return mail.

Just as with other civil actions, multiple plaintiffs should be charged a single filing fee if they are seeking joint relief. Multiple plaintiffs should be charged a single surcharge. If they file simultaneously, they may be asked to divide the surcharge; otherwise the first plaintiff to file must pay the entire surcharge. Regardless of whether a division normally advises plaintiffs to file a claim against multiple defendants on a single Statement of Small Claim (photocopying extra copies as needed for giving notice) or on separate Statement of Small Claim forms for each defendant, the plaintiff should pay only a single filing fee and surcharge.

Upon request, or when otherwise indicated, a plaintiff should be referred to the clerk-magistrate or a designated assistant clerk-magistrate for a determination as to whether entry fees should be waived pursuant to the Indigent Court Costs Law. G.L. c. 261, ss. 27A-27G and Uniform Small Claims Rule 2.

**3:04 SCHEDULING THE CASE.**

**SMALL CLAIMS SHOULD BE SCHEDULED FOR PROMPT TRIAL, WITH CONCERN FOR THE CONVENIENCE OF THE PARTIES. SMALL CLAIMS SESSIONS SHOULD BE SEPARATE FROM CRIMINAL SESSIONS AND ALL OTHER CIVIL SESSIONS. WHEN POSSIBLE, SEPARATE SESSIONS OR STARTING TIMES SHOULD BE SCHEDULED FOR CONSUMER AND COMMERCIAL SMALL CLAIMS PLAINTIFFS.**

COMMENTARY

Prompt trial dates are crucial to the success of the small claims process. Small claims trials should be scheduled no later than 4-8 weeks from filing of the initial claim. Trial dates beyond that time severely undermine the statutory goal of a prompt, efficient procedure. Conversely, scheduling a trial earlier than 4 weeks from filing generally does not allow sufficient time for the notices to the defendant to have been returned by the postal service if undeliverable. Also, if the trial date is set too soon, it may be unfair to one or both of the parties, as they may have to arrange for the appearance of witnesses, set up child care, schedule time off from work, and manage other details. In addition, while the plaintiff may have all of his or her facts and witnesses marshaled before filing the claim, the defendant may be unaware of the claim until he or she receives the notice from the court. If requested by one party to move up or postpone the trial date, court personnel should explain that adhering to a set date generally results in a fundamentally fair and evenhanded treatment of parties as they prepare for trial. See Standard 6:03 concerning continuances.

Small claims sessions should be conducted at times distinct and apart from busy criminal days or times. These times should be devoted solely to small claims matters and payment hearings. Courts are encouraged to be innovative and flexible in the scheduling of small claims sessions. The time of day and the day of the week for holding small claims sessions should be the subject of experimentation in keeping with the needs of the community. If deemed appropriate, small claims hearings may be divided into commercial and consumer sessions, with each category of plaintiff accorded a different starting time. Where volume requires it, sessions should be held more often than once per week. Small claims sessions should not be discontinued during the summer months. See Dist. Ct. Special Rule 202 which indicates that when so ordered by the justice of any court, small claims sittings may be held bi-weekly during the summer months.

**NOTICE OF TRIAL**
**STANDARDS 4:00 - 4:05.**


4:00 Purpose of Notice of Trial.

4:01 Form of Notice.

4:02 When Notice to Issue.

4:03 How Notice Served.

4:04 If Notice Refused or Not Served.

4:05 Service on Out-of-State Defendants.

**4:00 PURPOSE OF NOTICE OF TRIAL.**

**NOTICE OF TRIAL SERVES FOUR MAIN PURPOSES:**

1. **TO INFORM DEFENDANTS THAT A CLAIM HAS BEEN MADE AGAINST THEM;**

2. **TO EXPLAIN TO DEFENDANTS WHAT THEIR RIGHTS AND RESPONSIBILITIES ARE AS THEY RESPOND TO THE CLAIM;**

3. **TO WARN DEFENDANTS OF THE PROBABLE CONSEQUENCES SHOULD THEY FAIL TO APPEAR AT THE TRIAL; AND**

4. **TO NOTIFY ALL PARTIES OF THE DATE SET FOR TRIAL.**

COMMENTARY

The Notice of Trial is probably the defendant's first contact with the court and the first indication that an action has been brought. The typical small claims defendant may not have any idea of what is involved in a court proceeding. The Notice of Trial tells the defendant the name of the plaintiff bringing the claim and describes the nature of the claim. It also briefly instructs the defendant as to what the small claims process is and states his or her obligation to appear at trial and his or her opportunity to make an answer to the claim.

**4.01 FORM OF NOTICE.**

**THE APPROPRIATE COPIES OF THE MULTI-PART "STATEMENT OF SMALL CLAIM AND NOTICE OF TRIAL" FORM SHOULD BE USED TO NOTIFY THE DEFENDANT OF THE CLAIM.**

COMMENTARY

The court gives notice to the defendant by mailing copies of the Statement of Small Claim and Notice of Trial form promulgated by the Chief Justice for Administration and Management. Uniform Small Claims Rule 3(a). Court personnel should encourage plaintiffs to state their claims as clearly and specifically as they can, since small claims defendants, unlike most other civil defendants, are usually not represented by counsel and have limited discovery mechanisms available should they need to clarify an issue prior to the date of the hearing.

Plaintiffs who are willing to submit their claim to mediation may indicate this on the face of the Statement of Small Claim and Notice of Trial form. No separate form of notice is required to comply with the Notice of Mediation provisions of G.L. c. 218, s.22 and Uniform Magistrate Rule 4(b). See Standards 6:04 and 6:05.

**4:02 WHEN NOTICE TO ISSUE.**

**THE COURT SHOULD ISSUE NOTICE OF A CLAIM TO THE PARTIES WITHIN FIVE COURT DAYS OF THE FILING OF THE CLAIM.**

COMMENTARY

Pursuant to Uniform Small Claims Rule 2, a claim is commenced upon filing. The clerk-magistrate's office should issue notice to the defendant within five court days after receipt of the claim. Inordinate delay in issuing notice may hinder the defendant's ability to prepare adequately for trial and may not allow sufficient time for undeliverable notices to be returned by the postal service.

Prompt issuance of notice reflects the court's regard for the defendant's due process rights and demonstrates to both parties that the administration of justice is operating efficiently. See Uniform Small Claims Rule 3(a).

**4:03 HOW NOTICE SERVED.**

**INITIAL SERVICE ON THE DEFENDANT SHOULD BE BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, WITH A SECOND COPY SENT TO THE SAME ADDRESS BY REGULAR FIRST CLASS MAIL.**

COMMENTARY

The Massachusetts Rules of Civil Procedure regarding service of process are not applicable to small claims. In-state defendants should be served by certified mail. The return receipt, signed by the defendant or by one acting in his or her behalf, will serve as proof of service. Certified mail notice is sufficient even if the certified mail is unclaimed or refused by the defendant, provided that the separate first class mail notice is not returned to the court undelivered. Uniform Small Claims Rule 3 (a).

If the plaintiff indicates that the defendant has more than one address, the court should mail additional photocopies of the front *and back* of the Statement of Small Claim and Notice of Trial to each of the defendant's addresses at no additional cost to the plaintiff.

If the plaintiff is not satisfied with the certified-mail method of serving notice and requests another method, he or she may obtain initial service of notice by a deputy sheriff or constable, although this option is entirely at the plaintiff's expense. The constable or deputy sheriff should serve one of the two defendant's copies of the Statement of Small Claim and Notice of Trial, upon the defendant, and return the second copy to the court with his or her return of service. If "last and usual" constable service is made, the constable or deputy sheriff must obtain a photocopy of the notice to be mailed to the defendant in order to comply with G.L. c. 223, s. 31. If served by constable or sheriff, the defendant should receive the notice at least fourteen days before trial to enable him or her to prepare for the case.

In cases where the defendant is a corporation or trust, notice should be delivered to an appropriate officer, agent, or trustee. If service is mistakenly made on an officer personally when service on a corporation or trust was intended, the plaintiff should be permitted to amend the notice by naming or adding the intended entity. If the defendant has appeared in court despite the initial inaccurate notice, further service should not ordinarily be required, but the defendant should, if necessary, have the benefit of a continuance. If the defendant has not appeared, the court should order the amended claim to be served again.

**4:04 IF NOTICE REFUSED OR NOT SERVED.**

**IF THE CERTIFIED MAIL NOTICE IS NOT RETURNED OR IS RETURNED "REFUSED" OR "UNCLAIMED" AND THE DEFENDANT DOES NOT APPEAR FOR TRIAL, HE OR SHE MAY BE DEFAULTED UNLESS THE SEPARATE FIRST CLASS MAIL NOTICE HAS BEEN RETURNED UNDELIVERED. IF NOTICE IS INSUFFICIENT UNDER UNIFORM SMALL CLAIMS RULE 3 TO PERMIT A DEFAULT TO BE ENTERED, THE PLAINTIFF SHOULD BE TOLD WHAT FURTHER SERVICE IS NECESSARY.**

COMMENTARY

If the certified mail notice is returned "refused" or "unclaimed" but the separate first class mail notice is not returned undelivered, an inquiring plaintiff should be advised that he or she must still appear at court on the scheduled trial date. The plaintiff must be prepared for trial because the defendant may appear, based on the first class mail notice. If the defendant does not appear, the plaintiff's presence may be necessary to have the amount of damages set and because the court may wish to inquire into the basis of liability. See Standard 6:02. If the defendant does not appear, a default judgment should normally be issued. See Uniform Small Claims Rule 7(c); Standard 6:02.

If the separate first class mail notice is returned to the court undelivered, the plaintiff should be so informed. If the plaintiff believes that the defendant may be located at another address, new service should be made to that address by certified mail and by first class mail. As with initial notice, there should be no charge to the plaintiff. If the new address creates venue issues, see Standard 3:02.

If additional service by mail is not advisable, the plaintiff should be instructed how to arrange for a different method of service. The form of that service is to be as "[t]he Court may provide ... in individual cases as is deemed necessary"(Uniform Small Claims Rule 3[a]) and is not limited by the rules of service in other civil cases, although reference to service in other civil cases will provide guidance to the court in determining other means of service. See Uniform Small Claims Rule 1. This is an area appropriate for local experimentation. The following considerations are suggested to guide such experimentation:

- The goal is to ensure actual notice to the defendant. That goal must, within constitutional limits, be balanced with the recognition that some defendants consciously avoid service, and that expense or delay to the plaintiff are particularly to be avoided in small claims.

- Where both certified and regular first class mail notice have failed, further mail service of any sort to the same address is probably futile.

- Requiring in-hand service by a constable or deputy sheriff, while more certain, may add considerably to expense and delay. If cost is an important concern to a small claims plaintiff, the court may wish to consider appointing someone nominated by the plaintiff as an unpaid

special process server. If the plaintiff selects this option, the court should make the plaintiff aware that in-hand service by someone other than a constable or deputy sheriff may be difficult to effect, may increase the opportunity for a reluctant defendant to avoid service, and may even invite a physical confrontation between the defendant and the server.

- If a defendant's residence or workplace is known with some certainty, "last and usual" service delivered by a process server appears to be an appropriate solution in many cases.

- When a constable or deputy sheriff is to make service on the defendant, he or she should be encouraged to file the return at least three days before the scheduled trial date, so that the plaintiff will be able to ascertain in advance whether service has been made. When anyone other than a constable or deputy sheriff is permitted to effect in-hand or "last and usual" service, his or her return should be in the form of an affidavit filed at least three days before trial. The clerk-magistrate's office shall make available copies of the customary sheriff's return as an exemplar of such an affidavit.

If service cannot be effected prior to the scheduled trial date, the plaintiff should not be required to appear in order to obtain a continuance date. A court's case management policies should permit the clerk-magistrate's office to assign a further date in such cases.

If it is determined that the defendant cannot be served within the court's jurisdiction but his or her whereabouts are known, the plaintiff should be advised as to the proper court in which to continue the action. Upon the plaintiff's request, the small claim should be transferred to that other court with an appropriate note of its status. See G.L. c. 218, s. 21.

**4:05 SERVICE ON OUT-OF-STATE DEFENDANTS.**

**SERVICE ON OUT-OF-STATE DEFENDANTS MUST BE MADE IN ACCORDANCE WITH THE PROVISIONS OF G.L. c. 223A, s. 6.**

**PRETRIAL MATTERS**
**STANDARDS 5:00 - 5:06.**

5:00 Answers.

5:01 Counterclaims.

5:02 Discovery.

5:03 Transfers to the Civil Docket.

5:04 Third-Party Impleader.

5:05 Amendments.

5:06 Settlement.

**5:00 ANSWERS.**

**THE PURPOSE OF NOTICE IN A SMALL CLAIM IS TO BRING THE PARTIES BEFORE THE COURT SO THAT THE DISPUTE MAY BE HEARD AND RESOLVED. AN ANSWER MAY BE FILED AT ANY TIME PRIOR TO TRIAL.**

COMMENTARY

The Statement of Small Claim and Notice of Trial form sent to the defendant indicates that a written answer may be filed prior to trial by sending a letter to the court stating simply and clearly why the plaintiff should not prevail. The answer should state fully and specifically what parts of the claim are contested. The notice also informs the defendant that he or she should send a copy of the answer to the plaintiff. The plaintiff should be advised that he or she must appear at the scheduled trial even if no answer has been filed. Pursuant to Rule 3, the failure to file an answer will not result in the default of an action or otherwise delay the proceedings.

If the defendant does not file an answer, or does file one but fails to give the plaintiff timely notice, the court shall continue the case if the plaintiff requests and can demonstrate prejudice in going forward on the trial date. Uniform Small Claims Rule 3(b), as recently amended.

## 5:01 COUNTERCLAIMS.

**COUNTERCLAIMS MAY BE MADE AT ANY TIME IN THE PROCEEDING BUT ARE NOT COMPULSORY. IF NECESSARY, A DEFENDANT IN COUNTERCLAIM MAY BE PERMITTED ADDITIONAL TIME TO PREPARE FOR TRIAL.**

COMMENTARY

A defendant may raise any counterclaim against the plaintiff that is within the small claim procedure's jurisdiction. Uniform Small Claims Rule 3(c) defines a counterclaim very broadly as "any claim which [the defendant] has against the plaintiff"and therefore a small claims counterclaim need not arise out of the same incident as the original claim. Although under Rule 3 counterclaims are not compulsory, the court should accept all counterclaims from the same incident before or at the trial of the original claim, so that all matters arising from the same incident may be adjudicated at one time. A defendant should be informed that by bringing a counterclaim in the small claims session, he or she waives the right to a subsequent jury or bench trial with respect to that counterclaim.

Rule 3 requires that a counterclaim be set forth in writing, but specifically permits a defendant to do so at any time during the course of the proceedings. A defendant should not be required to file a counterclaim on a separate Statement of Small Claim and Notice of Trial form as if it were a separate claim. The defendant may file the counterclaim within his or her answer to the original claim or may write a separate letter to the court stating the counterclaim.

Rule 3 does not require that an answer or counterclaim be served upon the plaintiff, but it does provide that "the plaintiff's claim and the defendant's claim shall be deemed one case if the defendant mails notice of his claim to the plaintiff at least ten days in advance." As the rule permits the defendant to file a counterclaim in writing during the course of the proceedings, failure to serve a counterclaim before the trial date should not be automatic grounds for granting the plaintiff a continuance unless the plaintiff is genuinely surprised by the counterclaim at trial to the extent that he or she is prejudiced in his or her presentation. In general, if court personnel are in communication with the defendant, they should point out the importance of giving the plaintiff notice of the answer and/or counterclaim. If the defendant requests the court to do so, the court should mail the answer and/or counterclaim to the plaintiff at no cost to the defendant. The court should always permit the plaintiff to read or photocopy an answer or counterclaim filed by the defendant.

**5:02 DISCOVERY.**

**DISCOVERY IS NOT ROUTINELY AVAILABLE IN A SMALL CLAIM.**

COMMENTARY

Discovery is not available in a small claim except by leave of court "for good cause shown." Uniform Small Claims Rule 5. The court may allow discovery if it would provide material assistance to the court in deciding the case. See G.L. c. 231, ss. 61-69. If the court permits discovery, it should closely monitor the process in order to prevent confusion or possible harassment of an unrepresented party.

## 5:03 TRANSFERS TO THE CIVIL DOCKET.

**THE COURT SHOULD INQUIRE INTO THE UNDERLYING PURPOSE OF A MOTION FOR TRANSFER TO THE CIVIL DOCKET. THE MOTION SHOULD BE SCRUTINIZED CAREFULLY TO ENSURE THAT ITS ALLOWANCE WOULD NOT FRUSTRATE THE OVERALL PURPOSE OF THE SMALL CLAIMS PROCEDURE.**

### COMMENTARY

Motions for transfer of a small claim to the regular civil docket are permissible under G.L. c. 218, s. 24 and Uniform Small Claims Rule 4. Since transfer to the civil docket eliminates the simplified procedures available under small claims practice, such motions should be carefully scrutinized. The court should require the party making the motion to demonstrate the need for the transfer. The court should be alert for any indication that the motion is interposed for delay or for strategic advantage, particularly where the opposing party is unrepresented by counsel. Adequate reasons for transfer would include:

- the presence of a counterclaim arising from the same incident in excess of the small claims limits;
- other pending civil cases with the same or related parties;
- an artificial division of the claim to bring it within the small claims limits;
- the requirement of a compulsory counterclaim in a related case on the civil docket; or
- numerous witnesses or extensive discovery requirements.
- the preservation of appellate rights when there are issues of law. See Standard 8:05; Trust Insurance Company v. Bruce at Park Chiropractic Clinic, 430 Mass. 607, 610 (2000).

There is, however, one set of circumstances where the court has little or no discretion to deny such a motion, i.e. where a defendant moves to transfer on the grounds that his or her right to a jury trial under Article 15 of the Declaration of Rights of the Constitution of the Commonwealth, and to due process and equal protection under the Constitution of the Commonwealth and the United States Constitution would be impaired by the statutory provision giving *prima facie* effect to the court's decision on appeal in a jury or bench trial. Daum v. Delta Airlines, Inc., 396 Mass. 1013 (1986); Gozzo v. Anglin, 31 Mass. App. Ct. 936 (1991). In such cases, the motion to transfer must explicitly raise these rights. In addition, the court has discretion to scrutinize such a motion to determine whether the motion is in fact based on grounds other than the constitutional claims. In Lyons v. Kinney Sys., Inc., 27 Mass. App. Ct. 386, 389, 390. (1989), the court determined that a judge properly denied a motion to transfer a small claim to the regular civil docket where the basis of the motion, despite an invocation of Daum, was to obtain discovery.

The court, therefore, if presented with a motion for transfer, should analyze whether the motion before it is truly based upon Daum grounds. If the court so finds, the motion may be denied only if the plaintiff agrees in advance to waive the *prima facie* effect of a favorable finding by the magistrate in any later retrial before a jury. See Newgent v. Colonial Contractors & Builders, Inc., 348 Mass. 582 (1965) wherein the Supreme Judicial Court suggested such an approach in an analogous context.

If transfer seems appropriate, the court may wish to advise unrepresented parties of the complexity of regular civil actions.

If the court in its discretion orders a transfer from the small claim to the civil docket, the case should be entered on the court's civil docket pursuant to Rule 4 without payment of an additional entry fee, as if the cause of action had been begun in the first instance under the Massachusetts Rules of Civil Procedure. The defendant must file an answer within twenty days of the transfer unless the defendant has already answered in the small claims case. The court may, in the order of transfer or thereafter, direct any party to file specific additional or substitute pleadings pursuant to the Massachusetts Rules of Civil Procedure or impose such other terms as may appear just. G.L. c. 218, s. 24; Uniform Small Claims Rule 4, as recently amended.

If a claim for motor vehicle property damage is transferred to the civil docket at the request of the insurer, any judgment against the insurer must incorporate the other party's costs and reasonable attorney's fees. G.L. c.218, s. 23.

## 5:04 THIRD-PARTY IMPLEADER.

**THE DEFENDANT MAY JOIN AS THIRD-PARTY DEFENDANTS OTHERS WHO ARE ASSERTED TO BE LIABLE FOR ALL OR PART OF THE PLAINTIFF'S CLAIM.**

COMMENTARY

If a defendant informs the court that someone else is responsible for all or part of the claim against him or her, the court may inform the defendant that he or she may implead the other person as a third-party defendant.

The filing and notice procedure for impleading a party is the same as that required for initiating a claim. The defendant should not be charged a new filing fee or surcharge.

If the court becomes aware at trial that impleader is proper, the court may so inform the parties. The court may then decide the merits of the claim before it and suggest that the defendant bring another small claim to resolve any third-party liability that is asserted to exist. Alternatively, the court could continue the case to allow for service upon the impleaded party.

**5:05 AMENDMENTS.**

**AMENDMENTS SHOULD BE LIBERALLY ALLOWED.**

COMMENTARY

Amending a Statement of Small Claim and Notice of Trial should be liberally permitted "as justice may require" at any time before judgment, so that claims may be resolved on their merits rather than on technical considerations. Uniform Small Claims Rule 5; G.L. c.231, ss. 51, 71.

**5:06 SETTLEMENT.**

**THE COURT SHOULD ENCOURAGE SETTLEMENTS BETWEEN PARTIES TO A SMALL CLAIM.**

COMMENTARY

Settlement saves both parties the inconvenience of further court appearances and often provides a speedier resolution that is reasonably acceptable to both parties. The court should encourage settlement, particularly if the parties appear to exhibit a willingness to compromise. The clerk-magistrate's office should take advantage of its close contact with the parties to discuss the possibility of settlement.

If the parties do reach a settlement, the clerk-magistrate's office should inform the parties that it is advisable for them to reduce their agreement to writing and present it to the court for recording prior to entry of judgment, unless the interests of justice would not be served thereby, so that the court will have the power to enforce the agreement should it be violated. See recently amended Uniform Small Claims Rule 7(a). If the parties notify the court by mail prior to the trial date that the matter has been settled without reducing it to writing or requesting it to be entered as an order of the court, the court should place that letter in the file of the case. In these circumstances, there is no judgment, and no further action is required by the court.

**TRIALS AND OTHER RESOLUTIONS SHORT OF TRIAL**
**STANDARDS 6:00 - 6:10.**


6:00 Calling the List.

6:01 Dismissals.

6:02 Defaults; Military Affidavits.

6:03 Continuances.

6:04 Mediation: The Purpose.

6:05 Mediation: The Procedure.

6:06 Settlement.

6:07 Trial: The Purpose.

6:08 Trial: The Procedure.

6:09 Role of Participants**.**

6:10 Rules of Evidence.

## 6:00 CALLING THE LIST.

**THE SMALL CLAIMS SESSION SHOULD BEGIN PROMPTLY AT THE SCHEDULED TIME. BEFORE CALLING THE LIST, THE COURT SHOULD INSTRUCT THE LITIGANTS AS TO THE MEANING OF COURT TERMINOLOGY AND EXPLAIN THE ACTIONS THEY MAY BE REQUIRED TO TAKE.**

### COMMENTARY

The time and location of the small claims session should be clearly posted in the courthouse lobby. See Standard 2:00. The proceedings should begin promptly at the scheduled time. The court should understand that beginning the small claims session later than the appointed time may significantly inconvenience litigants who have appeared on time and who may have employment or family obligations to return to. If the court is running behind schedule (or if the court decides to briefly delay the call of the list in order to accommodate tardy litigants) an announcement should be made at the scheduled starting time out of courtesy to those who have arrived on time.

Court personnel should be sensitive to the fact that the calling of the list, though routine to them, may seem incomprehensible to an unrepresented litigant. A simple set of instructions, read loudly, clearly, and slowly by the court before the call of the list should obviate much of the confusion and uncertainty that may arise in the minds of litigants. The extent and contents of these instructions will vary with local practice. The court may wish to utilize the sample instructions provided as Appendix D.

If the court does not intend to hear cases immediately after the call of the list, an announcement should be made to inform litigants as to the amount of time they will have available before they must be present in the courtroom. Small courtesies such as this will be appreciated by litigants who need to tend to parking, make a telephone call, or take care of other personal matters.

## 6:01 DISMISSALS.

**IF THE PLAINTIFF FAILS TO APPEAR AT THE CALLING OF THE LIST, THE COURT SHOULD DISMISS THE CLAIM.**

COMMENTARY

If the plaintiff does not appear at the calling of the list, the court should dismiss the claim. Uniform Small Claims Rule 7 (c). If the defendant has appeared, the docket should reflect this fact.

If the plaintiff telephones the court in advance of the trial date to inquire whether the defendant has answered, the plaintiff should be informed that he or she must appear on the scheduled trial date even if the defendant has not filed an answer.

Whenever the court dismisses a small claim, it should utilize the Notice of Judgment form to give notice of the dismissal to both parties.

See Standard 7:06 when a plaintiff wishes to reactivate a claim that has been dismissed for failure to appear.

## 6:02 DEFAULTS; MILITARY AFFIDAVITS.

**IF THE DEFENDANT FAILS TO APPEAR AT THE CALLING OF THE LIST, THE COURT SHOULD ISSUE A DEFAULT AGAINST THE NON-APPEARING DEFENDANT AND SHOULD ROUTINELY ORDER JUDGMENT AND A PAYMENT ORDER FOR THE PLAINTIFF. A SEPARATE MILITARY AFFIDAVIT IS NECESSARY ONLY IF THE APPROPRIATE BOX HAS NOT BEEN COMPLETED ON THE STATEMENT OF SMALL CLAIM.**

COMMENTARY

If the defendant has defaulted by not appearing at the call of the list and the plaintiff is present, the court should routinely enter judgment for the plaintiff. Uniform Small Claims Rule 7(c),(f), and (g) contemplates a largely automatic process and does not require that the court hear a *prima facie* case. It is advisable, however, for the court to briefly review the claim, and, if necessary, to conduct a hearing in cases where the damages are uncertain or the claim itself appears to be totally without merit or beyond the jurisdiction of the court. Courts should analyze the amount of damages sought in order to make sure that the plaintiff's loss is not overstated. Examples of situations where reductions would be appropriate include: unprovable damages; instances of partial payment or partial performance; inflated claims; depreciated value; lower actual cost to the plaintiff; uncertain estimates; and instances where collection expenses or interest or other costs (e.g., lost wages for attending court) have been improperly included.

Once the amount of the judgment has been established, the court should immediately enter a thirty day payment order.

A military affidavit is required before entry of a default judgment. The Federal Soldiers' and Sailors' Relief Act of 1940 (54 Stat. 1178, 50 U.S.C. App. s. 520 [1]) requires that before a default judgment is entered, "the plaintiff...shall file in the court an affidavit setting forth facts showing that the defendant is not in military service." Except in special circumstances, a separate form of military affidavit should not be required for a small claim. Because speedy trials are the norm for small claims, the plaintiff's verified statement that the defendant is not in the military in the Statement of Small Claim and Notice of Trial is sufficiently contemporaneous with the entry of judgment to fulfill the requirements of the Act. The filing of a military affidavit does not prevent a default judgment from being voidable upon a showing of a meritorious defense if the defendant was in military service when the judgment was rendered. 50 U.S.C. App. s. 520 (4).

See Standard 7:06 concerning removal of a default judgment.

## 6:03 CONTINUANCES.

**THE COURT SHOULD ONLY GRANT CONTINUANCES UPON A SHOWING OF GOOD CAUSE UNLESS BOTH PARTIES VOLUNTARILY AGREE TO THE CONTINUANCE.**

COMMENTARY

A court's case management policies should permit continuances that are agreed to by both parties provided that the parties request the continuance sufficiently in advance of the scheduled trial date. Inasmuch as small claims trials are scheduled within a short time period (eight weeks or less) from the date of the filing of a claim, parties often need additional time either to reach out-of-court settlements or to accommodate their work or personal schedules. The parties should not be required to appear in person in order to obtain a mutually agreed upon continuance.

Continuances that are requested by only one party should be granted for good cause only. The court must determine each case on an individual basis. The court should routinely grant motions for continuances that are filed well in advance of the date of trial unless there is prejudice to the other party. The court should allow requests for continuances that are filed close to the date of trial only in exceptional circumstances. Uniform Small Claims Rule 3, as recently amended, provides for two such circumstances: when a plaintiff is prejudiced by the circumstances of (1) a defendant's answer or (2) a defendant's counterclaim. In all cases, the court should give speedy notice to the other side of an allowance of a continuance, by telephone if the trial date is near, in order to minimize inconvenience to the other party.

On the date of the trial, when only a judge is available to hear the case, the court should grant a continuance to a defendant who declines to elect to waive the right to appeal for a subsequent trial by a judge or before a jury. The new trial date should be one when the court expects a clerk-magistrate to be available to hear the case. See Standard 2:03.

## 6:04 MEDIATION: THE PURPOSE.

**THE COURTS SHOULD PROVIDE MEDIATION SERVICES AND ENCOURAGE SMALL CLAIMS LITIGANTS TO TAKE ADVANTAGE OF MEDIATION AS A POSSIBLE SUBSTITUTE FOR TRIAL.**

COMMENTARY

Crucial to the fair resolution of a small claim is the determination whether the parties need the services of a mediator or that of an adjudicator, whether they can reach a solution together with some assistance and prodding or whether nothing but an "outside umpire's" call will end the matter. Clerk-magistrates and designated assistant clerk-magistrates are encouraged by statute and rule to make their services as mediators available. See G.L. c. 218, s. 22; G.L. c. 221, ss. 62B, 62C (d); Uniform Magistrate Rule 4.

Clerk-magistrates and assistant clerk-magistrates who offer their services as mediators should first complete basic mediation training. A magistrate who has acted as a mediator should not thereafter rule on any motion or preside over any trial or enforcement proceeding in the same small claim. In the Housing Court, housing specialists can assist parties to identify areas of dispute and resolve their differences through the process of dispute intervention. Housing specialists, clerk-magistrates and assistant clerk-magistrates who conduct mediation sessions must receive approval as a dispute resolution program from the chief justice of the applicable department. See Supreme Judicial Court Rule 1:18, Uniform Rules on Dispute Resolution, Rule 2 (definition of "program"), 4(a) and 6(a).

It is obvious that successful mediation and dispute intervention help the court by reducing the number of small claims requiring a contested trial, but mediation and dispute intervention have many positive benefits to litigants as well. Because mediation and dispute intervention allow parties to retain control over the outcome of the dispute, they often produce more satisfying results than adjudication and a greater commitment to maintaining the agreement. Mediation is even more informal than a small claims adjudicatory hearing and often allows parties to resolve their disputes with greater privacy and speed than adjudication. It allows parties to avoid all-or-nothing solutions, and, if offered in the courthouse on the day of trial, makes it clear to parties that they have the option to proceed directly to a trial if they are unable to reach agreement in mediation or dispute intervention. Finally, mediation teaches people who are in an ongoing relationship (such as families, landlords and tenants, and business associates) techniques that will assist them in maintaining the relationship and in dealing with future conflicts.

A clerk-magistrate who provides mediation is bound by ethical standards for neutrals set forth in Supreme Judicial Court Rule 1:18, Uniform Rules on Dispute Resolution, Rule 9. A clerk-magistrate has very limited authority or ability to redress unequal bargaining power between the parties because of financial means, education, or other social factors, but a clerk-magistrate and must terminate mediation if he or she believes that continuation of the process would violate any of the

ethical standards. See Supreme Judicial Court Rule 1:18, Uniform Rules on Dispute Resolution, Rule 9(i).

Although mediation of small claims is strongly encouraged, courts must bear in mind the statutory limits of their mediation authority. A small claim may be submitted to mediation or dispute intervention only "with the agreement of both parties" and any action "which is not resolved by agreement may, at the request of any party, be heard" for adjudication. G.L. c. 218, s. 22. The statutory scheme provides for mediation at the option of the parties, not for a system which is mandatory. See Supreme Judicial Court Rule 1:18, Uniform Rules on Dispute Resolution, Rule 6(d).

Although not specifically provided for by statute, many courts successfully utilize the services of qualified unpaid volunteer mediators. A volunteer who understands the role and the limitations of the mediator function can render an important service to the court and the community.
Courts may attempt to obtain the services of volunteer mediators through a community mediation program, the Massachusetts Office of Dispute Resolution, a university-run mediation program, or some other comparable group. Before accepting the services of a volunteer mediator, the court must ensure that any such volunteer mediator is affiliated with a program which has been approved by the chief justice of the applicable department. See Supreme Judicial Court Rule 1:18, Uniform Rules on Dispute Resolution, Rules 4(a) and 6(a).

## 6:05 MEDIATION: THE PROCEDURE.

**MEDIATION OF SMALL CLAIMS SHOULD BE DONE IN AN INFORMAL MANNER THAT PERMITS THE PARTIES TO EXPRESS THEIR DISAGREEMENTS AND THEN GUIDES THEM BEYOND THAT POINT TO EXPLORE POSSIBLE SOLUTIONS.**

COMMENTARY

The District Court Special Committee to Study Alternative Means of Dispute Resolution has offered some suggestions for mediation in the courts. Similar considerations apply to dispute intervention:

> When disputants elect to mediate their dispute, their choice should be an informed one. They should understand the mediation process, its purpose, and the details of the judicial alternative for resolving their dispute. The impact of their decision should also be explained. They should be notified that, irrespective of their initial decision to mediate their dispute, they may have a court hearing....
>
> At the commencement of a mediation session, the mediator should explain that he is not a Judge . . . and that the proceeding differs from a trial. Throughout the process, he should not find fault with any of the disputants, but should assume the role of an objective third party in assisting the disputants to reach an agreement. He should not accept as accurate any disputant's version of a contested issue and should never take sides. Further, he should act as a referee, controlling . . . outbursts and directing the parties to discuss the disputed issues.
>
> As the mediation session progresses, the mediator's role changes. At first, the mediator serves as a confidant. He listens to each disputant relate his version of the controversy and tries to control interruptions and interjections by the other disputant. The rendition of the cause of the quarrel is beneficial for two reasons. The disputants have a need to tell a neutral third party why they have been wronged.... In addition, the mediator needs to learn some background information about the controversy.
>
> Once disputants have aired their grievance, the mediator must assume a more active role in trying to isolate the areas of agreement and disagreement. Some specific questions may be asked to clarify the nature of the dispute.... Once the contested issues are discerned, the mediator should encourage the disputants to discuss them further.
>
> Next, the mediator must play an active part in discerning whether a mutually acceptable solution can be reached. The mediator may ask each disputant how the dispute may be resolved. If that tactic proves ineffective, it may be necessary for the mediator to speak with each disputant privately. The use of the caucus technique will enable the mediator to learn each party's "bottom line." Privy to this information, the mediator may guide parties to reach a mutually acceptable agreement when the disputants reconvene....

> The mediator may make suggestions and describe alternatives. The disputants may demonstrate an unwillingness to compromise. Symbolic gestures...as well as verbal expressions of dissatisfaction may indicate that an impasse has been reached....
>
> Frequently the disputants will continue discussing their differences and will reach an agreement.... At the conclusion of the mediation session, disputants should be notified of the follow-up procedure and their options should there be a breakdown in the agreement.
>
> Special Committee Report at 19-21.

It should be noted that the "caucus" technique, i.e. discussing the matter separately with each party, is a sensitive one. It may lead to an impression of favored treatment. As a rule, when caucusing is done, it should be done with both parties.

Mediation and dispute intervention sessions should not be recorded or participants sworn. Other procedures are in the magistrate's discretion, "consistent with the achievement of a voluntary resolution of the dispute." Uniform Magistrate Rule 4 (c).

It is normally appropriate for a mediator to communicate the results of mediation in writing to the clerk of the small claims session. Supreme Judicial Court Rule 1:18, Uniform Rules on Dispute Resolution, Rule 7(g). If the mediation attempt has been unsuccessful, however, the mediator may not report agreed facts or stipulations which the parties have reached, in order to simplify issues for trial, unless both parties give their permission. Supreme Judicial Court Rule 1:18, Uniform Rules on Dispute Resolution, Rule 6(f) and 9(h). At the conclusion of a dispute intervention, the housing specialist may communicate to the court his or her recommendations, a list of those issues which are and are not resolved, and the housing specialist's assessment of whether the case will go to trial or settle, provided the parties are informed in advance of the session that such communication will occur. Supreme Judicial Court Rule 1:18, Uniform Rules on Dispute Resolution, Rule 6(f)(iv). If the mediation or dispute intervention has resulted in a voluntary agreement, it should be reduced to writing and signed by the parties. Unless the interests of justice would not be served thereby, the clerk of the small claims session then enters judgment and a payment order in the case in accordance with the agreement. Uniform Magistrate Rule 4 (e). Each party must be given a copy of the written agreement inasmuch as the agreement "frequently serves as a reminder to the disputants and demonstrates their good faith," Special Committee Report at 21. A successfully settled case should always be reduced to an agreed-upon judgment and payment order as this will facilitate enforcement proceedings should they become necessary. Uniform Magistrate Rule 4 (e) and (f).

If a matter shows promise for resolution by mediation or dispute intervention, but final agreement cannot be obtained in a single session, it may be continued for further sessions in compliance with the court's case management policies. With the agreement of the parties, a court may also schedule mediation sessions before the date set for trial if both parties' willingness to mediate is known in advance. Repeated court appearances should be minimized, however, and therefore courts should routinely schedule mediation or dispute intervention sessions on the same day as the small claims session. A simple claim that cannot be successfully mediated or resolved through dispute intervention

should normally proceed to trial immediately.

**6:06 SETTLEMENT.**

**IN APPROPRIATE CASES, THE COURT MAY FACILITATE A SETTLEMENT SHORT OF TRIAL.**

COMMENTARY

Even when the parties have not requested mediation, the court must initially make a determination, similar to the exercise undertaken by a mediator, as to whether the parties are actually demanding a judgment or are essentially utilizing the small claims session as a place to discuss disagreements and arrive at informal solutions. Often the parties may not be able to immediately articulate what they are asking of the court; the clerk-magistrate or judge must help them clarify their positions.

Obviously, settlement and adjudication involve two very different processes, and the court should clearly understand its role in each. In a settlement, the court's primary goal is to help the parties reach a conciliation and agree to a specific, mutually acceptable result. If, on the other hand, the court is adjudicating a dispute, its goals are to provide due process and to render a decision that is correct under substantive rules of law. The court may wish to point out to the parties that there are at least three essential aspects of adjudication that are dramatically different from the mediation and settlement processes:

- a third party, the adjudicator, is given coercive power;
- each party usually obtains only a "win or lose" decision; and
- decision making is focused narrowly on the immediate matter at issue, as distinguished from a concern with the underlying relationship between the parties.

Where it becomes clear that the parties will not, or will no longer, work towards a settlement, the court must consciously change roles from conciliator to fact finder. To prevent misunderstanding, it is important that the parties note this change of function. The court must explicitly communicate to the parties that once the case moves into an adjudication phase their roles also change. The parties must understand that they are now operating within an adversarial context, and that they must marshal whatever evidence and arguments they wish to present to the court.

The societal importance attached to criminal matters and civil cases of a higher dollar amount should not diminish the allocation of attention and time spent in achieving a full and fair hearing for small claims litigants who are insistent upon trial rather than negotiation.

Unless the interests of justice would not be served thereby, any settlement agreement should be entered as a judgement, with a payment order, if appropriate. Uniform Small Claims Rule 7(a), as recently amended.

## 6:07 TRIAL: THE PURPOSE.

**THE PURPOSE OF A TRIAL OF A SMALL CLAIM IS TO OBTAIN AN ADJUDICATION OF AN ISSUE BETWEEN THE PARTIES THAT IS BASED UPON INFORMATION PRESENTED BY THE PARTIES AND THE APPLICATION OF SUBSTANTIVE LAW. THE COURT SHOULD GIVE THE PARTIES SUFFICIENT OPPORTUNITY TO PRESENT THEIR CASES AND SHOULD RECOGNIZE THAT THE CASE IS IMPORTANT TO THE PARTIES DESPITE THE RELATIVELY SMALL MONETARY AMOUNT INVOLVED.**

### COMMENTARY

Even though a small claims trial dispenses with much of the customary legal procedures, forms, and terminology, the parties should understand that the concept of an adversary hearing, basic to our jurisprudence, remains intact. Indeed, for some small claims litigants the opportunity merely to present arguments in this forum is almost as important as the actual decision in the case. The trial may be the culmination of months of frustration and tension. Their opportunity to present their respective positions to an impartial arbiter who has the authority to resolve their disputes according to substantive law is their "day in court."

## 6:08 TRIAL: THE PROCEDURE.

**BEFORE A TRIAL BEGINS, THE COURT SHOULD EXPLAIN THE PROCEDURE TO THE LITIGANTS. THE COURT SHOULD CONDUCT SMALL CLAIMS TRIALS IN AN INFORMAL MANNER WHILE MAINTAINING ORDER AND PROTECTING THE DUE PROCESS RIGHTS OF THE PARTIES.**

COMMENTARY

The attractiveness of small claims procedure is a direct reflection of the atmosphere in which it is conducted and the quality of justice that is perceived to be available. While small claims sessions are apt to be busy and sometimes emotional, the court must insist that litigants do not use the informality to debase the forum. It is also important that the court be perceived as giving equal consideration and impartiality to the hearing of small claims as it does to more complex trials.

Small claims trials should be conducted in open court and on the record. Tape recording of trials is necessary for accountability purposes and so that the court will have a record of evidence to consult if the small claim is taken under advisement. At least one court officer should attend all small claims sessions. Uniform Small Claims Rule 7(d) and (e), as recently amended.

Before trials begin, the court should instruct parties as to how they are to proceed. (See Appendix E for sample instructions.) To save time, the instructions should be given to all the litigants waiting for trials rather than individually.

Before commencing a trial, the court should determine whether any party has a language barrier that inhibits full understanding of the proceedings. A continuance may be in order if there is not a qualified interpreter present. See Standard 2:05.

The court should conduct the trial in whatever order and form and with such methods of proof as it deems best suited to discover the facts and do justice in the case. Uniform Small Claims Rule 7(c). The Supreme Judicial Court has commented on the implications of this Rule.

> Rule 7...provid[es]...that a judge shall have wide discretion in conducting the hearing as to "order and form" and "methods of proof" in matters that in formal procedure are governed by fixed rules or principles....The statute would fail of its purpose if it merely substituted for established rules or principles applicable to ordinary procedure another set of detailed rules for the trial of cases under the small claims procedure. The informality that is to characterize a hearing under the small claims procedure imports that the judge may be permitted by rule to exercise a wide discretion.... Even under formal procedure the judge "ought to be always the guiding spirit and the controlling mind at a trial" ...[and] may put proper questions to witnesses....The statute relating to small claims procedure, however, contemplates, if necessary, more active participation of the judge in the conduct of the hearing than is usual under formal procedure. Obviously it was intended by the statute to provide a form of hearing in which assistance of parties by counsel would not be required... [and] in such cases active participation

by the judge in the examination of witnesses ordinarily would be essential for discovery of the facts and determination of the justice of the case...." McLaughlin v. Municipal Court of the Roxbury Dist., 308 Mass. 397, 403-405 (1941), citations omitted.

Informalities may thus be permitted in order to encourage ease. Parties and other witnesses must be sworn when testifying (see Uniform Small Claims Rule 7 [e]) but the parties may stand or sit at the counsel tables rather than take the witness stand. They may use conversational tones and present facts in narrative form; they may be permitted to alternate speaking when such order of evidence appears warranted.

When an oral motion is made, the court should note on the docket sheet whatever action the court takes on the motion. Uniform Small Claims Rule 7 (e). Motions to amend pleadings should be liberally allowed so that claims are determined on their merits rather than on technical considerations. Uniform Small Claims Rule 5.

Despite the informality of the proceedings, the plaintiff must, as in any civil action, prove each of the elements of his or her cause of action by a preponderance of the evidence and according to the rules of substantive law. G.L. c.218, s. 21.

## 6:09 ROLE OF PARTICIPANTS.

**SMALL CLAIMS LITIGANTS MAY UTILIZE ATTORNEYS TO ASSIST IN THE PRESENTATION OF THEIR CLAIM OR TO APPEAR IN THEIR BEHALF. THE ROLE OF THE ATTORNEY MAY BE LIMITED, BUT NOT ELIMINATED, BY THE COURT. SMALL CLAIMS LITIGANTS MAY ALSO UTILIZE NON-ATTORNEYS TO ASSIST THEM OR, AT THE COURT'S DISCRETION, TO APPEAR IN THEIR BEHALF.**

COMMENTARY

Attorneys may represent parties at small claims trials. A party represented by counsel should not be required to appear personally unless the party is a necessary witness. Although attorneys are permitted in small claims sessions, the forum was "obviously" intended to provide a form of hearing that did not require assistance of counsel. See McLaughlin v. Municipal Court of the Roxbury Dist., 308 Mass. 397, 405 (1941). Thus, the court should carefully control the proceedings to insure that the presence of an opposing attorney does not inhibit a full presentation by the unrepresented litigant. One party cannot, "by being represented by counsel, change the essential nature of the hearing [and] by being so represented relieve the judge of his duty under the statute." Uniform Small Claims Rule 7 (e). The court has wide discretion as to the extent of participation by counsel in a hearing, and, in appropriate circumstances, may refuse to permit uncooperative counsel to examine witnesses. McLaughlin at 406. Limitations imposed on particular attorneys should stem from inappropriate tactics or style rather than from the merits of their client's cases.

Non-attorneys closely connected to a party, such as spouses, family members, or employees, may be permitted to appear in place of the party if the court, in its discretion, is satisfied that the person is authorized to appear for the party and that substantial justice can be accomplished with the use of a surrogate. If it should have been obvious that the personal presence of a party was necessary to determine the issues, the court may refuse to credit the testimony of a surrogate party. In such circumstances, a continuance should be denied and/or appropriate costs may be imposed under Uniform Small Claims Rule 7(h). In reaching its decision as to whether a particular individual is a legitimate surrogate, a distinction may appropriately be made between those parties who are necessary to a fair trial because they are percipient actors in, or witnesses to, the disputed matter, and those (such as officers of corporate plaintiffs) whose testimony is unlikely to be valuable.

The court may permit spouses, family members, employees, and others to assist an appearing party in the presentation of his or her evidence. Uniform Small Claims Rule 7(h). In this area there is no "bright line" rule, and the court must balance its desire to maintain the informality of the small claims procedure with the need to limit formal representation of others to those subject to the discipline of the court.

The court may impose reasonable limitations on the presentation of evidence and argument, but this must not be done summarily or arbitrarily. Procedural due process, albeit simplified, must always be adhered to. O'Farrell v. Dubin, 16 Mass. App. Dec. 100 (N. Dist. 1958).

**6:10 RULES OF EVIDENCE.**

**THE COURT SHOULD NOT REQUIRE STRICT ADHERENCE TO THE RULES OF EVIDENCE IN SMALL CLAIMS TRIALS.**

COMMENTARY

The small claims procedure has from its inception been intended to give

> ... an opportunity to the parties to come directly before the judge, tell him their story, answer his questions, and let him settle it, and that is what most people in such small matters want....
>
> [T]he extent to which rules of practice shall be applied may well be left to the discretion of the courts. The judge is dealing directly with parties who are not lawyers and do not understand the rules of evidence. The judge can sift the evidence. He is left free to get at the facts. When he gets them, he applies the law and decides the case.
>
> Report of the Judicature Commission 12, 14, 1920 House Doc. No. 597.

The court should not require adherence to technical rules of evidence except those relating to privileged communications. Evidence, including hearsay evidence, may be admitted and given probative effect if it is the kind of evidence that reasonable persons are accustomed to rely upon in the conduct of serious affairs. In keeping with the nature of the small claims procedure, the court may restrict the form of cross-examination and may exclude unduly repetitious evidence.

Although the rules of evidence are relaxed, the court should not overlook its duty to assure the relevance and reliability of the evidence admitted.

This Standard is also applicable to trials on appeal. See Standard 8:02.

**JUDGMENTS AND PAYMENT ORDERS.**
**STANDARDS 7:00 - 7:07.**


7:00 Rendering of Decision.

7:01 Promptness of Decision.

7:02 Remedies.

7:03 Payment Orders When Decision Announced.

7:04 Payment Orders When Decision Reserved or the Defendant Defaults.

7:05 Costs.

7:06 Relief from Judgment.

7:07 Modification of Payment Orders.

## 7:00 RENDERING OF DECISION.

**THE COURT SHOULD FAVOR ANNOUNCING THE DECISION OF A SMALL CLAIM AT THE END OF THE TRIAL.**

COMMENTARY

Clerk-magistrates and judges have varied opinions as to the advantages and disadvantages of announcing a decision in a small claim at the conclusion of the trial as compared with taking a case under advisement and then rendering a decision at a later time. The practice of rendering a decision immediately at the end of the trial has certain advantages that would make this practice preferable.

By announcing a decision immediately at the end of the trial, finality is brought to the process. The court also has the opportunity to state briefly to the parties the reasoning behind the decision. To some people, understanding the reasoning behind the decision is as important as the decision itself. Since the court appearance is often the finale of a long disagreement between the parties where each party may have extensively planned and worried over its presentation and taken time from work to be in court, an immediate decision and explanation is preferable to simply having the case taken under advisement and subsequently rendering a decision in the mail without any explanation.

In cases where the plaintiff prevails and the defendant does not wish to claim a jury trial or bench trial, another very important advantage of rendering a decision at the conclusion of the trial while the parties are still before the court is to enter into an immediate discussion of the defendant's ability to pay. This avoids additional delay and the need for a further court appearance to attend a subsequent payment hearing. See Standard 7:03. A full payment hearing can and should be entered into immediately upon rendering a decision. Occasionally the court may need to grant a short continuance in order to gather additional information necessary to evaluate a defendant's ability to pay, but such continuances should be the exception and not the rule. If, for any reason, a payment hearing is not commenced immediately upon the rendering of a decision, then a full payment hearing shall be scheduled no later than thirty days from the time judgment is entered or shortly thereafter.

Those in favor of reserving decision emphasize that small claim sessions may be volatile, and sometimes the rendering of an immediate decision might provoke emotional outbursts, taxing the court's patience as well as its time. For this reason, all small claim sessions should have appropriate court officers assigned to the session just as they are to all other court sessions.

There are times when further research is necessary in order to render a just decision. In those circumstances, the court should take the appropriate time.

Regardless of which approach is utilized by the court, a written decision with a brief statement of findings where possible should be issued by the court immediately after a decision is made even

if the decision is made orally at the end of the trial. The court's comments at the time of trial or at the time of rendering a decision serve to assist the litigants in understanding the reasoning behind each other's position and controlling their emotional reaction to the decision. All decisions should be reasoned and based upon substantive law. A final decision must be just and not based upon "a flip of the coin" or a splitting of a decision equally between the parties without any basis in fact or substantive law. Although all clerk-magistrates and judges have discretion in rendering decisions, when decisions are made without the application of logic, reasoning, or pertinent mathematical calculations, there exists the possibility of the public losing faith in the decision-making process. This is not to suggest that there are not cases where the court must render a decision without any precise logical or mathematical guides. There are, obviously, cases that require the best decision of the fact finder that is devoid of mathematical certainties.

Any orders for payment should be included in the decision and mailed to the parties promptly.

**7:01 PROMPTNESS OF DECISION.**

**IF THE COURT DOES NOT ANNOUNCE A DECISION AT THE END OF THE TRIAL, IT SHOULD TELL THE PARTIES WHEN THEY MAY EXPECT A DECISION. UNLESS SPECIAL CIRCUMSTANCES NECESSITATE FURTHER DELAY, THE DECISION SHOULD BE MADE WITHIN FIVE COURT DAYS OF TRIAL.**

COMMENTARY

The court's obligation after trial is to render a decision. Although an immediately-rendered judgment is generally preferable, invariably there will be times when the court will take the case under advisement. In these instances, the court should make every effort to reach its decision within five court days of the trial. If special circumstances preclude this - e.g. the court is awaiting receipt of further evidence or time consuming research is required - the court should give the parties some indication of when they may expect a decision.

**7:02 REMEDIES.**

**THE COURT HAS THE POWER TO ENTER MONEY JUDGMENTS AND EQUITABLE RELIEF.**

COMMENTARY

Although the original action brought must include a claim for money damages, the court may order equitable remedies such as specific performance, instead of, or in addition to, damages. The court has all equity powers and jurisdictions conferred by G.L. c.218, s. 21 and G.L. c. 214, ss. 1, 1A, 2, 3 (1).

## 7:03 PAYMENT ORDERS WHEN DECISION ANNOUNCED.

**IF A DECISION FOR THE PLAINTIFF IS ANNOUNCED AT THE END OF TRIAL, THE DEFENDANT SHOULD BE EXAMINED AS TO ABILITY TO PAY, AND A PAYMENT ORDER SHOULD BE MADE CONTEMPORANEOUSLY WITH THE JUDGMENT.**

COMMENTARY

A plaintiff who has prevailed should not, if at all possible, have to make additional court appearances in order to obtain a payment order. Uniform Small Claims Rule 7(g) requires that a payment order be entered immediately upon decision "except where justice will not be served thereby." Therefore, unless there is a compelling reason - e.g. additional information is needed to properly evaluate a defendant's ability to pay - the court should conduct a full payment hearing immediately after announcing its decision.

Prior to the commencement of any payment hearing, the defendant must be advised of his or her right to appeal the court's judgment on the small claim. See Standard 8:00. If the defendant indicates he or she will appeal, the court shall not conduct a payment hearing.

Payment orders should be issued for the amount of the judgment plus allowable costs and should require payment by a definite date or on a definite schedule, unless the court finds an inability to pay or that the defendant's income is exempt from judgment. See Uniform Small Claims Rule 7(g) and 7(h) and Standard 7:04. If the defendant requests time to pay and the schedule of periodic payment proposed by the defendant is unacceptable to the prevailing party, the court shall require the defendant to complete a written financial statement on a form prescribed by the Chief Justice for Administration and Management. The financial statement should provide information sufficient to determine the source of the defendant's income and ability to pay and to allow the court to order specific and suitable payment installments. In making an order to pay, the court should observe all relevant statutory exemptions, such as those in G.L. c. 235, s. 34. See G.L. c. 224, s. 16, made applicable to small claims by G.L. c. 218, s. 23. The court should recognize that unrepresented defendants may not be aware of such exemptions. If the defendant's income is exempt or the defendant is unable to pay, the court should continue the payment hearing date to a further date to see if the defendant's financial status has changed.

The provisions of a payment order should be entered on the Notice of Judgment form. In unusual circumstances, the court may order the defendant to make payments through the court rather than directly to the prevailing party. Uniform Small Claims Rule 7(g).

A payment order against a corporation is made by naming its president, treasurer, cashier, or other officer or agent in charge of the payment of corporate debts. A payment order against a trust with transferable shares is made against the trustee or agent in charge of payment of its debts. See G.L. c. 224, ss. 2, 15, made applicable to small claims by G.L. c. 218, s. 23. In such situations, the person should be named in her representative capacity, i.e. "Jane H. Jones, as President of ABC, Inc."

In the rare cases where the court is unable to conduct a payment hearing upon decision, that

hearing may be continued for a period of time not to exceed thirty days or shortly thereafter.

The court must inform the defendant that failure to comply with a payment order could result in his or her or her being held in contempt.

See Standard 7:07 as to modification of payment orders.

## 7:04 PAYMENT ORDERS WHEN DECISION RESERVED OR THE DEFENDANT DEFAULTS; AUTOMATIC PAYMENT HEARINGS.

**IF THE COURT FINDS FOR THE PLAINTIFF AFTER DECISION HAS BEEN RESERVED, OR IF THE DEFENDANT DEFAULTS AT THE HEARING, AN ORDER TO PAY IN FULL WITHIN THIRTY DAYS SHOULD BE ENTERED AND A PROMPT PAYMENT HEARING SCHEDULED.**

COMMENTARY

In cases where the decision is not announced at trial or in default situations, a payment order should routinely be entered for the full amount of the judgment and costs, payable in full in thirty days unless the court specifically orders a longer period. The making of such orders is essential to expeditious small claims processing. When the court informs the small claims assistant clerk-magistrate or small claims supervisor of his or her decision in a reserved case, the assistant clerk-magistrate or small claims supervisor should confirm with the clerk-magistrate or judge that a thirty day payment order should also enter. In an exceptional case where the court consciously declines to issue a payment order at the time of judgment because "justice will not be served thereby," (see Uniform Small Claims Rule 7 [g]) or the defendant has no present ability to pay, the court should direct the small claims assistant clerk-magistrate or small claims supervisor to note that ruling on the docket sheet as a guide in subsequent hearings on the matter.

A payment order against a corporation is made by naming its president, treasurer, cashier, or other officer or agent in charge of the payment of corporate debts. A payment order against a trust with transferable shares is made against the trustee or agent in charge of payment of its debts. See G.L. c. 224, ss. 2, 15, made applicable to small claims by G.L. c. 218, s. 23. In such situations, the person should be named in her representative capacity, i.e. "Jane H. Jones, as President of ABC, Inc."

Pursuant to the new Uniform Small Claims Rule 7 (g), the court should automatically schedule a payment hearing at the time of the judgment and payment order. In most cases, the automatic payment hearing should obviate the need for a show cause hearing. Historically, a show cause hearing took weeks and months to schedule. This new rule was promulgated in order to obtain a quick determination as to whether the defendant has exempt income or is unable to pay and to eliminate the need for the plaintiff to obtain and pay for service of process and thus save the plaintiff additional frustration in those cases where the defendant's financial status precludes the judgment from being satisfied.

The payment hearing must be scheduled for the thirtieth day following judgment or shortly thereafter. The court must send to the parties a Notice of Payment Hearing as well as the Notice of Judgment. The defendant is afforded several options within the thirty day period. First, the defendant in a case that went to trial may claim an appeal within ten days of receipt of Notice of Judgment, in which case the payment hearing would be canceled. Second, the defendant can simply pay the successful party and satisfy the judgment. (A form should be provided for the plaintiff and

the defendant to file with the court as evidence of payment.) Third, the defendant can appear at the payment hearing and the burden would then fall upon him or her to show why payment should not be made in full. For the defendant to avail himself of this option, however, he or she would have to fill out a Trial Court-approved financial disclosure form and provide a copy to the plaintiff in advance of the payment hearing. The court should be mindful of the statutory exemptions for certain types and amounts of income, such as those in G.L. c. 235, s. 34. See G.L. c. 224, s. 16, made applicable to small claims by G.L. c. 218, s. 23. The court should recognize that unrepresented defendants may not be aware of such exemptions.

If the defendant fails to appear at the payment hearing, this failure to appear shall constitute a default and subject the defendant to arrest. If the defendant appears but has failed to provide a financial statement, the court should direct the defendant to do so forthwith. If the defendant refuses to fill out a financial statement, then the matter should be referred to a judge on the issue of contempt. The court, in addition to reviewing the defendant's financial statement, may require additional financial information including, but not limited to, income tax returns, payroll information, and investment information.

The court must inform the defendant that failure to comply with a payment order could result in his or her being held in contempt of court. In most cases, the court should schedule review dates to ensure compliance with any orders entered for payment or to review the ability to pay of a defendant who is currently judgment proof or unable to pay. These review dates allow the court to become more pro-active with respect to the satisfaction of judgments entered and orders made.

A successful small claims litigant should never be required to initiate formal supplementary process proceedings under G.L. c. 224 to obtain a payment order. Similarly, the Uniform Small Claims Rules no longer require that the losing party be summonsed (by the procedure formerly referred to as "small claims supplementary process") merely for the court to issue a payment order. If, inadvertently, a payment order was not made at the time of judgment, upon inquiry by the prevailing party, the small claims assistant clerk-magistrate or small claims supervisor should bring the omission to the attention of a clerk-magistrate or judge in order to have a payment order entered and a payment hearing scheduled.

**7:05 COSTS.**

**THE ACTUAL CASH DISBURSEMENTS OF THE PREVAILING PARTY FOR ENTRY FEE AND SURCHARGE SHOULD BE ASSESSED AS COSTS. WITNESS FEES AND OTHER COSTS MAY BE ALLOWED ONLY BY COURT ORDER. THE COURT SHOULD EXAMINE CAREFULLY ALL CLAIMS FOR DISCRETIONARY COSTS.**

COMMENTARY

The prevailing party should receive his or her actual cash disbursements for filing and services fees. The court may tax other costs, such as witness fees or fees for experts, only by special order. Any specific statutory provisions regarding the costs of civil proceedings are applicable to such special situations. Additional costs not exceeding $100.00 may be assessed against any party who has set up a frivolous or misleading claim or answer, or otherwise sought to hamper a speedy and fair resolution of the dispute at hand. See Uniform Small Claims Rule 7(h).

Attorney's fees should not be added to the judgment unless there is a written provision for such in the contract upon which the claim is based. See G.L. c.186, s. 20 with respect to contractual attorney's fees in actions involving residential leases. Attorney's fees may also be awarded where expressly authorized by statute, but the court should weigh such awards carefully in the light of the "obvious" legislative intent that small claims procedure should not require assistance of counsel. McLaughlin v Municipal Court of the Roxbury Dist., 308 Mass. 397, 405 (1941).

## 7:06 RELIEF FROM JUDGMENT.

**THE COURT SHOULD EXERCISE WITH CAUTION THE DISCRETION TO GRANT RELIEF FROM JUDGMENT, INCLUDING VACATING DISMISSALS AND REMOVING DEFAULTS.**

COMMENTARY

Within one year of the date of judgment, the court may grant relief from judgment or from any order "for want of actual notice to a party, for error, or for any other cause that the court may deem sufficient,"and may condition relief upon any reasonable condition. See amended Uniform Small Claims Rule 8. The court may not grant such relief *ex parte*. The opposing party must be given an opportunity to be heard in opposition to a request for relief from judgment. Although Mass. R. Civ. P. 59 (New Trials) and 60 (Relief from Judgment or Order) do not apply to small claims, case law applying Rules 59 and 60 may appropriately guide a clerk-magistrate or judge's discretion in granting relief from judgment in a small claim.

A plaintiff seeking to vacate a dismissal for failure to appear for trial (see Standard 6:01) or a defendant seeking to remove a default judgment (see Standard 6:02) must file a motion for relief from the judgment pursuant to Rule 8 within the one year period. The court must require a showing of sufficient cause before permitting a plaintiff to bring the claim again or vacating a defendant's default. The court must be wary not to permit simplified small claims procedures and the nominal filing fee to be used by a negligent or ill-willed plaintiff to harass a defendant or abuse the process itself. McLaughlin v. Levenbaum, 248 Mass. 170, 176 (1924). Likewise, the fact that a small claims defendant may have a meritorious excuse why he or she did not appear in court as required, is not, of itself, sufficient reason to require the removal of a default. Younis v. Mario Musto Corp., 1979 Mass. App. Dec. 240, 243 (S. Dist.) See also, Maguire v. Quality Foreign Cars, Inc. 54 Mass. App. Dec. 76, 81, 82 (N. Dist. 1974) wherein refusal to remove default was upheld where judge found that defendant's attorney intentionally harassed the plaintiff by phoning the court to ask that case be held until later.

Even if a party can show sufficient cause for the failure to appear, the court may consider an award of costs for lost wages and other out-of-pocket expenses to the opposing party who appeared in good faith at the initially scheduled court date. See amended Uniform Small Claim Rule 8.

## 7:07 MODIFICATION OF PAYMENT ORDERS.

**THE COURT MAY MODIFY A PAYMENT ORDER AT ANY TIME BASED ON NEW EVIDENCE OR CHANGED CIRCUMSTANCES.**

COMMENTARY

Either party may request the court to modify the terms of any payment order if the defendant's financial circumstances change or if the plaintiff becomes aware of newly discovered evidence that effects the defendant's financial ability to satisfy the judgment. All requests for modification of a payment order must be done through the court and proper notice shall be sent to the parties by the court. At any hearing on the modification of the payment order, the court may require additional financial statements by the defendant or other evidence sufficient to establish the need for modification of a previously entered payment order.

**APPEALS**
**STANDARDS 8:00 - 8:05.**


8:00 Appealing from the Judgment.

8:01 Scheduling the Case for Trial.

8:02 Conduct of the Trial.

8:03 Judgments and Payment Orders.

8:04 Motions to Allow Apparently Late Filed Appeals.

8:05 Further Appellate Rights.

## 8:00 APPEALING FROM THE JUDGMENT.

**A DEFENDANT AGAINST WHOM A JUDGMENT HAS BEEN RENDERED (INCLUDING THE DEFENDANT IN A COUNTERCLAIM OR THIRD PARTY CLAIM), MAY APPEAL FOR A TRIAL BY A JUDGE OR BEFORE A JURY OF SIX PERSONS, UNLESS THE DEFENDANT ELECTED TO HAVE THE CASE TRIED INITIALLY BY A JUDGE, IN WHICH INSTANCE THERE IS NO OPPORTUNITY FOR ANOTHER TRIAL.**

**THE DEFENDANT MUST FIRST:**

1. **FILE AN AFFIDAVIT SETTING FORTH QUESTIONS OF LAW AND FACT IN THE CASE REQUIRING A TRIAL AND STATING THAT SUCH TRIAL IS INTENDED IN GOOD FAITH;**

2. **PAY AN ENTRY FEE UNLESS FOUND INDIGENT; AND**

3. **POST A BOND, UNLESS WAIVED OR NOT REQUIRED.**

COMMENTARY

Within ten days of receipt of the court's judgment after a trial, the defendant (including a defendant in a counterclaim or third party claim) may file a notice that he or she claims a trial by a judge or before a jury of six persons unless the defendant has waived the right to appeal by electing to have the case tried initially by a judge. There is no right to another trial if there has been such an election. See Standard 2:03. There is also no right to another trial if the judgment is due to the defendant's default. See Standards 6:02 and 7:06 regarding the defendant's course of action to remove a default. The statute limits an appeal to matters where there was a "finding" by the court "where the cause was determined". G.L. c.218, s. 23. Interpreting a similar statute, the Appeals Court has indicated that a dismissal or default is not an appealable "decision or finding." H. Sandbar & Son, Inc. v. Clerk of the Dist. Court of N. Norfolk, 12 Mass. App. Ct. 686 (1981).

The claim does not need to be on a Trial Court form but must be in writing and must comply with the requirements of G. L. c. 218, s. 23 and shall specify whether the defendant claims a trial by a judge or by a jury. The appeal must also be accompanied by:

- an affidavit that specifies the questions of law and fact in the case requiring a trial by judge or jury of six and that states that such trial is intended in good faith;

- a $25.00 entry fee that the court may waive if the applicant is indigent; and

- a bond in a penal sum of $100.00, with such sureties as may be approved by the plaintiff or the clerk-magistrate or an assistant clerk-magistrate, payable to the other party to satisfy any judgment and costs that may be entered against that party. The bond is not required for municipal and county bodies and officials, from defendants who have already posted bond to dissolve an

attachment, or to appeal from a judgment secured by a motor vehicle insurance policy. A residential landlord's appeal from an adverse small claim decision involving a security deposit requires a higher bond, details of which are set out in G.L. 218, s. 23. The court may waive the $100.00 bond requirement if it finds that the defendant has insufficient funds to furnish the bond and that the appeal is not frivolous.

Personnel in the clerk-magistrate's office should provide litigants who wish to appeal with information regarding the procedure consistent with Standards 2:00 and 3:00. Personnel shall ascertain whether the defendant elects a jury trial or claims a trial before a judge and shall note that decision on the papers if it is not set forth in the defendant's claim. After the appeal and appropriate bond are filed, if the defendant claims a jury trial, the clerk-magistrate's office must promptly transmit the papers to the jury session designated to hear small claims for that court.

## 8:01 SCHEDULING THE CASE FOR TRIAL.

**THE COURT SHOULD SCHEDULE THE CASE FOR PROMPT TRIAL. A DISTRICT COURT THAT DOES NOT HAVE A JURY SESSION IS RESPONSIBLE FOR SCHEDULING BENCH TRIALS IN THAT DIVISION.**

### COMMENTARY

Small claims trials before a jury or judge are designated as "speedy trial[s]" by statute and therefore the court must give them priority. G.L. c. 218, s. 23. The statutory goals of a simple, informal, and inexpensive procedure are frustrated when the litigants on appeal are not given a trial date that is within two or three months from filing or are subjected to many continuances because their cases are treated as secondary to the criminal docket. The court must therefore schedule a prompt trial upon receiving the appeal claim and make sure that small claims cases are not set down for days with a heavy volume of criminal trials.

Although it is always appropriate for the court to encourage settlement (see Standards 5:06 and 6:06), the court should not place undue pressure on the parties to settle or to waive a jury trial because of a crowded docket.

If a court has separate jury and jury-waived trial lists, the clerk's office should note carefully whether the defendant has requested a jury trial or a trial before a judge and place each case on the appropriate list. A District Court that does not have a jury session must try jury-waived cases in that division; those cases should not be sent to the court designated for jury trials. Uniform Small Claims Rule 7(a).

Pursuant to G.L. c. 218, s. 23, the court may require pleadings pursuant to the Massachusetts Rules of Civil Procedure, but the court should rarely exercise this power so as not to frustrate the goals of the small claims procedure. The court should not entertain motions for summary judgment. Todino v. Arbella Mutual Ins. Co., 415 Mass. 298 (1993) (summary judgment not available to defendant).

**8:02 CONDUCT OF THE TRIAL.**

**THE COURT SHOULD CONDUCT THE TRIAL CONSISTENT WITH STANDARDS 6:07-6:10 EXCEPT FOR:**

1. **THE PRIMA FACIE EFFECT OF THE JUDGMENT OF THE FIRST TRIAL;**

2. **THE APPLICABILITY OF THE PROVISIONS OF LAW CONCERNING JURY TRIALS IN THE SUPERIOR COURT; AND**

3. **A PROHIBITION ON COUNTERCLAIMS AND THIRD PARTY CLAIMS BEING RAISED FOR THE FIRST TIME.**

COMMENTARY

Standards 6:07 - 6:10 apply to trials on appeal. Strict adherence to the rules of evidence in a jury trial or trial before a judge should not be required as it would be confusing and unfair to litigants to be governed by relaxed rules of evidence in the original trial and then later be subjected to strictly enforced evidentiary rules at the trial on appeal. Uniform Small Claims Rule 10(b). Pursuant to Uniform Small Claims Rule 7, which is applicable to appeals, "(t)he Court shall conduct the trial in such order and form and with such methods of proof as it deems best suited to discover the facts and do justice in the case." See Standard 6:10, which states that although the rules of evidence are relaxed, the court should not overlook its duty to assure the relevance and reliability of the evidence admitted.

The judge should advise the parties and at a jury trial instruct the jury that judgment was entered in the plaintiff's favor in the original trial, and that the *prima facie* effect of such judgment will require a finding in favor of the plaintiff unless the defendant introduces some credible contradictory evidence during the trial. The judge should also make clear that the earlier judgment will be evidence for the plaintiff even when the defendant does introduce contradictory evidence.

In a jury trial, all of the provisions of law governing jury trials in Superior Court, such as required *voir dire* questions and the manner of taking a verdict, apply, except that peremptory challenges are limited to two for each side. G.L. c.218, s.23; Rule 10(b). Pretrial Superior Court procedures such as summary judgment should not be used in small claims cases. Uniform Small Claims Rule 1. See also Todino v. Arbella Mutual Ins. Co., 415 Mass. 298 (1993).

A counterclaim or third party claim may not be raised for the first time on appeal.

## 8:03 JUDGMENTS AND PAYMENT ORDERS.

**JUDGMENT SHOULD BE ENTERED IMMEDIATELY ON A JURY VERDICT OR A JUDGE'S DECISION. ON A VERDICT, OR IF THE JUDGE ANNOUNCES A DECISION AT THE END OF TRIAL, THE JUDGE SHOULD ENTER A CONTEMPORANEOUS PAYMENT ORDER AFTER A PAYMENT HEARING.**

### COMMENTARY

A judgment shall be entered forthwith upon the decision of the judge or the verdict of the jury. On a verdict, or on a judge's decision announced at the conclusion of a bench trial that requires payment of damages, the judge should hold a payment hearing and order payment to the prevailing party unless the defendant is "judgment proof" or unable to pay. See Standard 7:03. The court should also address the disposition of any bond posted by the appealing party. The court shall promptly furnish each party with written notice of the court's judgment and order of payment along with the scheduled date of a hearing to measure compliance or ability to pay.

If, after a jury-waived trial, the judge decides that the interests of justice require reserving decision, the judge, upon reaching a decision, should, pursuant to Standard 7:04, order payment and schedule a payment hearing within thirty days or shortly thereafter. The payment hearing should take place in the court where the original small claim was filed unless the judge retains jurisdiction in his or her court.

## 8:04 MOTIONS TO ALLOW APPARENTLY LATE FILED APPEALS.

**THE COURT SHALL PERMIT APPEALS TO PROCEED ONLY IF THE APPEALING PARTY CAN DEMONSTRATE THAT THE APPEAL WAS FILED WITHIN TEN DAYS FROM ACTUAL RECEIPT OF NOTICE.**

COMMENTARY

The clerk-magistrate's office must accept for docketing any notice of a claim for a trial by judge or jury of six, even if it appears that the appealing party is filing after the deadline of ten days from receipt of judgment has expired. Morales v. Commonwealth, 424 Mass. 1010 (1997); Davis v. Tabachinick, 425 Mass. 1010 (1997). The clerk-magistrate shall return to the appealing party who appears to be filing late the filing fees and appeal bond, and the clerk-magistrate shall inform the party that he or she must file a motion, with notice to the opposing party, to allow the appeal to go forward. A judge must hear the motion. Uniform Small Claims Rule 10(a).

The court should allow an appeal to proceed only if the appealing party can demonstrate that the appeal was filed within ten days from actual receipt of notice. There is no authority to enlarge the time for filing beyond ten days.

**8:05 FURTHER APPELLATE RIGHTS.**

**IN THE DISTRICT COURT OR BOSTON MUNICIPAL COURT, THE CASE MAY BE APPEALED TO THE APPELLATE DIVISION IF THE JUDGE, IN THE JUDGE'S DISCRETION, SUBMITS A QUESTION OF LAW TO THE APPELLATE DIVISION, BUT ONLY IN THE FORM OF A REPORT OF A CASE STATED. IN THE HOUSING COURT, FURTHER APPEAL IS TO THE APPEALS COURT.**

COMMENTARY

After a jury trial or a jury-waived trial in the Housing Court, the losing party may appeal to the Appeals Court as in any Superior Court civil jury trial. Uniform Small Claims Rule 10(e). There is no such option in the District Court or the Boston Municipal Court. G.L. c. 218, §23; Trust Insurance Company v. Bruce at Park Chiropractic Clinic, 430 Mass. 607, 610 (2000).

In the District Court or the Boston Municipal Court neither party has a right to a report of a question of law to the Appellate Division, but the judge may report a question to the Appellate Division in the form of a case stated. G. L. c.218, s. 23. Such reports are limited to questions of law only. Questions of fact or discretion may not be reported.

In the Housing Court, the notice of appeal must be filed within ten days of judgment. Uniform Small Claims Rule 10(e).

**ENFORCEMENT OF JUDGMENTS**
**STANDARDS 9:00 - 9:05.**


9:00 Enforcement of Judgments - General.

9:01 Compliance Review Hearings.

9:02 Arrest and Show Cause Procedures.

9:03 Contempt.

9:04 Attachment.

9:05 Execution.

## 9:00 ENFORCEMENT OF JUDGMENTS - GENERAL.

**IN ORDER FOR THE SMALL CLAIMS PROCEDURE TO BE EFFECTIVE, THE PARTIES MUST HAVE SOME ASSURANCE THAT THE JUDGMENT WILL BE SATISFIED UNLESS THE DEFENDANT IS JUDGMENT PROOF OR UNABLE TO PAY. TO THAT END, THE COURT SHOULD TAKE AN ACTIVE ROLE IN THE ENFORCEMENT OF JUDGMENTS. INSTITUTION OF SUPPLEMENTARY PROCEEDINGS SHOULD NOT BE REQUIRED TO SATISFY A SMALL CLAIMS JUDGMENT.**

COMMENTARY

Probably the most frequent complaint of small claims plaintiffs who have had judgments rendered in their favor is the difficulty they encounter in enforcing that judgment. After devoting substantial time, effort, and out-of-pocket expense to the prosecution of their cases, successful plaintiffs too often find themselves unable to collect payment. Historically, the courts have required these plaintiffs to activate each step in the enforcement proceedings. In many respects, this requirement has proven to be too complex for the average plaintiff. Given the relatively small amount of money that is usually involved in small claims, many plaintiffs become discouraged and decide that it is not worth the further time and effort needed to continue to pursue payment from the defendant.

The court therefore should assume a more active role in the enforcement process. The recent amendments to the Uniform Small Claims Rules intend that more active role and eliminate the necessity of formal show cause or supplementary process hearings in most cases. Although there will inevitably be some judgments that will ultimately prove to be uncollectible (e.g. because the person's source of income is not subject to execution), there are specific things that the court may do to speed up the enforcement process and make it more effective. These include:

- requiring strict compliance with the automatic payment hearing procedure sent with the Notice of Payment Hearing;

- scheduling a compliance hearing or hearings after entering a payment order so that the burden is not on the plaintiff to get the case back on the list;

- requiring strict compliance in completing the financial disclosure form and requiring additional financial information when warranted, including, but not limited to, income tax returns, payroll stubs, production of bank books, contributions to retirement funds, and payments to creditors; and

- holding the defendant in contempt after a hearing before a judge.

If the defendant moves to the jurisdiction of another court at any time during the process of enforcing a payment order, the small claim may be transferred at the request of the plaintiff to the court in the judicial district to which the defendant has moved for further enforcement actions. This matter should not automatically be transferred but may be transferred if requested by the plaintiff. Uniform Small Claims Rule 9 (b).

## 9:01 COMPLIANCE REVIEW HEARINGS.

**IF THE COURT HAS ENTERED A PAYMENT ORDER AFTER HOLDING A PAYMENT HEARING, IT SHOULD IN MOST INSTANCES SCHEDULE REVIEW HEARINGS TO MONITOR COMPLIANCE WITH ITS ORDER.**

### COMMENTARY

In most cases where payment orders have been entered after a payment hearing, the court should schedule a compliance review hearing or a series of hearings. The court should play this pro-active role rather than placing the burden on the plaintiff to have the case placed back on the list. At the time of scheduling the review, the court can inform the plaintiff that he or she can cancel the hearing if payment is made prior to the scheduled date.

If the defendant fails to appear at any compliance review hearing, the court should invoke the procedures for a *capias* or order to show cause set forth in Standard 9:02. If both parties are present and the court determines there is noncompliance with the payment order, the court may consider one or more of the following steps:

- requiring the defendant to fill out a new financial statement to determine ability to pay and whether any of the defendant's income is now exempt;
- revising the payment order and setting a new review date;
- referring the case immediately, or, where justice so requires, at a later date, to a judge for a contempt hearing.

## 9:02 ARREST AND SHOW CAUSE PROCEDURES

**WHEN A DEFENDANT FAILS TO APPEAR AT A PAYMENT HEARING OR A COMPLIANCE REVIEW HEARING OR THE COURT RECEIVES INFORMATION FROM THE PLAINTIFF THAT THE DEFENDANT HAS NOT COMPLIED WITH A PAYMENT ORDER, THE COURT SHOULD TAKE IMMEDIATE STEPS TO BRING THE DEFENDANT BEFORE THE COURT.**

COMMENTARY

Should a party who has the ability to pay fail to satisfy a payment order, the principal tool available to the court is contempt proceedings. In all instances, once an order for payment has been made, the defendant should be informed that failure to make payment may result in the defendant being held in contempt of court for failure to comply, and, that upon a finding of contempt, he or she may be fined or imprisoned. No contempt proceedings should be commenced within the ten day appeal period.

If the defendant fails to appear at a scheduled payment hearing, then the court may issue a *capias* for the defendant's arrest. If the court is satisfied that the defendant received the notice of payment hearing in the mail, the court has authority to order the *capias* if the defendant fails to appear; more formal notice, including in-hand service, is not required. In certain circumstances, the court may schedule a show cause hearing in lieu of issuing a *capias*. This procedure should only be utilized if and when the court, after appropriate inquiry, is uncertain as to whether the defendant may be in contempt of court and therefore arrest would be inappropriate or where the court believes there may be deficiencies in the notice to the defendant. Service of a notice to show cause must comply with Uniform Small Claims Rule 9.

Since a sheriff has no means of determining who is an officer of a corporation and thus may be liable for arresting the wrong person, a *capias* issued against a corporation or trust should state the name of the specific officer, trustee, or agent against whom the payment order was made and whom the law treats as the contemnor. (See G.L. c. 224, ss. 15,16, and Standard 7:02.) In such situations, the contemnor should be named in the *capias* in his representative capacity - e.g. “Jane H. Jones, as President of ABC, Inc.”

Once the court has ordered a *capias*, the clerk-magistrate’s office should issue it immediately. The small claims form of *capias* should expire in all courts after one year. This period of time should be sufficient for the sheriff or constable to bring the defendant before the court. Historically, shorter periods of time have proven insufficient and have required additional pleadings and court appearances to obtain a new *capias*. This one year period should eliminate additional court appearances and delays in bringing the defendants before the court.

If a plaintiff presents the court with *ex parte* evidence that the defendant has not complied with a payment order, the court should schedule a compliance hearing with written notice to the defendant, or, if the noncompliance appears willful, the court may schedule at the plaintiff’s request a show cause hearing.

## 9:03 CONTEMPT

**ONCE THE DEFENDANT IS BEFORE THE COURT ON A *CAPIAS* OR ORDER TO SHOW CAUSE, THE COURT SHOULD EXPEDITIOUSLY HOLD A CONTEMPT HEARING. ONLY A JUDGE MAY FINE OR IMPRISON A DEFENDANT.**

### COMMENTARY

When the defendant comes before the court on a *capias* or order to show cause, a contempt hearing shall be held and the court shall take such action permitted by law as it deems appropriate to the end that orders for payment are complied with promptly and satisfaction of the judgment in the case is not frustrated. Uniform Small Claim Rule 9 (a). The defendant should understand the serious point to which the proceedings have progressed. Thus, when the debtor is before the court on arrest, the fact that he or she is under arrest should be made clear to the debtor. The court should hear the matter even if the debtor is brought in on a day other than one scheduled for small claims or enforcement of judgments. This procedure is recommended because, if chronic debtors are aware that they will be arrested only on that day, they may make themselves unavailable. If the court cannot, or in the interest of justice should not, hear the case that day, the court has the power to set bail.

Only a judge can find contempt, fine, and imprison a defendant; remedies short of imprisonment or punitive fine may be administered by a clerk-magistrate or assistant clerk-magistrate. Uniform Small Claim Rule 9(b), as recently amended. A judge considering incarceration as the remedy for contempt has two options. The first is to issue a traditional civil contempt ruling whereby the defendant is held in jail only so long as the court's order for payment or other terms set by the judge to purge the contempt are not complied with. In a civil contempt proceeding, due process requires that the court advise the defendant of the particulars of the charge against him or her, that the defendant have a reasonable opportunity to be heard in reply, including offering testimony and calling witnesses, and that the defendant has the right to have retained counsel represent him or her. Petition of Crystal, 330 Mass. 583 (1933). There is no right to trial by jury. Matter of DeSaulnier, 360 Mass. 769 (1971).

The judge's second option is to proceed under the quasi-criminal provisions of G.L. c. 224, s. 18. Under this procedure, the defendant may be punished by not more than thirty days in the common jail or a fine of not more than $200.00. Because of the punitive nature of the sanction, more extensive due process is required.

**9:04 ATTACHMENT.**

**PRETRIAL ATTACHMENT IS NOT AVAILABLE IN SMALL CLAIMS ACTIONS. POST-JUDGMENT ATTACHMENT MAY BE PERMITTED WHERE NECESSARY TO SECURE SATISFACTION OF THE JUDGMENT.**

COMMENTARY

Pretrial attachment is not permitted for a small claim. Attachment after judgment may be granted by the court in accordance with statutory provisions and applicable civil rules. Uniform Small Claims Rule 6. This apparently means that in lieu of levy of execution (see Standard 9:04), a judgment creditor may, as part of a civil action brought on the small claims judgment (see G.L. c. 235, s. 14), obtain an attachment (see G.L. c. 223, ss. 42-132) or trustee process (see G.L. c. 246) to secure the amount of the judgment.

In small claims, a real estate attachment may not be granted to secure a judgment of $20.00 or less. G.L. c. 223, s. 42.

## 9:05 EXECUTION.

**AN EXECUTION SHALL BE ISSUED ONLY WHEN REQUESTED.**

COMMENTARY

Executions obtained in small claims can be very useful to a judgment creditor in realizing its judgment against the defendant. When an execution is requested by a judgment creditor, the execution shall be issued by the court without inquiry as to the reason why the judgment creditor is requesting the execution. Executions are not needed for the payment hearing nor for the issuance of a *capias*. A small claim action need not be dismissed when the judgment creditor requests an execution. Execution shall issue fifteen court days after the date of judgment (Uniform Small Claims Rule 7 [f]) unless the case is appealed for jury trial. G.L. c. 235, s. 16. A plaintiff who has obtained an execution need not surrender it to enforce a payment order, but may not obtain a double satisfaction. Uniform Small Claims Rule 7(i).

Most often, executions in small claims are needed for extrajudicial purposes. The Registry of Motor Vehicles requires an execution to suspend a defendant's license for an unpaid property damage judgment. G.L. c. 90, s. 22A. Motor vehicle insurance companies often require an execution before they will pay a contested claim. In these cases, the plaintiff should be informed to request an execution.

# APPENDIX A: The Statute

**APPENDIX B:**

**Trial Court Rule III**
**Uniform Small Claims Rules**
**(Effective January 1, 2002)**

## Appendix C: SJC Advisory Committee Opinion

SUPREME JUDICIAL COURT

ADVISORY COMMITTEE ON ETHICAL OPINIONS

FOR CLERKS OF THE COURTS

1350 COURTHOUSE

BOSTON, MASSACHUSETTS 02108

617-557-1161

95-6

November 8, 1995

Dear Register

This is in response to your letter of September 8, 1995, in which you request advice from the Committee on a number of questions concerning the practice of law. You are the Register of Probate in the Division of the Probate and Family Court Department. You refer the Committee to S.J.C. Rule 3:02(2) which prohibits all Clerks of Court, Registers of Probate and the Land Court Recorder, and their assistants and employees from "engaging in the practice of law during the time they hold such office or employment."

Your employees, clerks and assistant registers have asked you to define what constitutes the practice of law pursuant to the rule. You ask this Committee: " 1) Should this rule be interpreted to preclude any Clerk, Register, Recorder and their assistants and employees who are attorneys from engaging in the private practice of law;

or

2) should we read it in a broader context to apply to all the identified employees, regardless of whether they are attorneys, in their daily interactions with the members of the Bar and the general public in their roles as providers of access to the judicial system."

You further ask that, if the prohibition is interpreted in the broader context, the Committee provide guidance on the parameters of what constitutes legal practice. You describe five scenarios concerning which you request specific guidance. The scenarios, which we set forth below, are examples of situations which occur

daily at the divisions in your department. With respect to each of the examples, you ask whether the Committee's interpretation of the "practice of law" would differ if the registry employee were responding to an attorney rather than a pro se litigant.

The five scenarios follow.

I. In response to a litigant's inquiry, a registry employee will suggest "the best" or "preferred" manner in which the litigant can proceed in the action.

Scenario 1: A grandmother comes to the counter to ask for help; she wants her grandson to come and live with her because the child's mother is addicted to drugs and unable to care for the son. The child's father is dead and has left money for the child but mother is spending it quickly on drugs. The registry employee tells the grandmother what the possibilities are with regard to filing a petition for guardianship of a minor of the person and the estate, or just the person and explains the need for filing a bond and the various types of sureties on the bond. After asking a few more questions of the grandmother, the registry employee suggests she file a guardianship of minor of the person and the estate, and a bond with sureties.

II. In response to a litigant's inquiry, the registry employee will advise the litigant of the options available to them and procedures which the litigant should follow.

Scenario 2: A husband calls the court to ask for no-fault divorce forms and when the registry employee asks which type of no-fault divorce, the husband responds he didn't know there was more than one. The registry employee distinguishes the Joint Petition for Divorce, Irretrievable Breakdown pursuant to c. 208, § 1A, and the Complaint for Divorce used for Irretrievable Breakdown pursuant to c. 208, § 1B, as well as the fault divorces. The registry employee further enumerates the forms and materials required for each type and outlines the process and time lines for the two Irretrievable Breakdown actions.

III. In a typical incident of "counter assistance," the registry employee may do any or all of the following: explain terminology used in forms and the descriptions of the legal process; advise how to complete the form; actually complete the form; or explain a registry practice, i.e., marking up motions, or making service.

Scenario 3: A pro se litigant arrives at the counter saying her former husband is not paying the medical

bills for her children as he was ordered in the divorce judgment. She has no money, speaks with an accent, and says the collection agency is threatening to bring her to court. She asks what she can do to make her former husband pay these bills. The registry employee gives her a complaint for contempt form and tells her to fill it out. The litigant begins to ask questions about the form, and the registry employee recognizes the litigant is illiterate. The registry employee reads the information requests on the form and fills it out quoting the plaintiff. The registry employee files the complaint and gives a copy of it along with a summons to the litigant and tells her how it should be served.

Scenario 4: A Vietnamese mother comes to the counter with bandages on her arms and face, two children bearing bruises on their arms and legs, and another woman. The mother wants to file a Complaint for Protection from Abuse, and to keep her address secret from her boyfriend. She speaks no English, and the woman with her speaks English but can not write it. The registry employee, through the English-speaking friend, asks the questions on the form and completes the form. Again, through the interpreter, the registry employee asks for a description of the incident of violence, and completes the affidavit based upon what the interpreter states.

Scenario 5: Pro se parties have come to the court for a wife's motion for temporary support in a Complaint for Civil Support action. The judge had referred them to the Family Service Office asking that financial statements be completed for each party. The Probation Officer learns that the wife has previously paid all the bills and kept the accounts because the husband cannot add and subtract. The Probation Officer asks the husband the questions on the financial statement, writes the answers, and gives the completed financial statement to the husband for signature.

We note at the beginning of our discussion, that although you refer the Committee to the prohibition on the practice of law contained in S.J.C. Rule 3:02, this Committee is only empowered and charged with interpreting the Code of Professional Responsibility for Clerks of Court. Canon 3 of that Code, however, provides similarly that "[A] Clerk-Magistrate shall not engage in the practice of law".

The Committee reads Canon 3's primary purpose as assuring that court employees do not practice law for private clients, whether or

not for a fee, either during or after their normal hours of employment by the Court. Such a prohibition both assures that court employees devote their full time to their duties, see Canon 3, and that they avoid private business dealings which could suggest a lack of impartiality in their role as court employees. See Canons 4(C) and 5(C)(1). It is, in the Committee's view, an integral part of a court employee's mandate to be sufficiently skilled and qualified to provide service to litigants and their attorneys in their dealings with the Courts, and we do not read this Canon to suggest or require otherwise.

We do recognize that the Canons, in particular Canons 4 and 5, require clerks to remain impartial, and we can conceive of situations where the degree of advocacy-oriented assistance provided to a litigant would not only call these Canons into operation but possibly raise the risk that the litigant would unjustifiably rely upon a clerk's advice as he or she might that of an attorney, potentially implicating Canon 3 under a far narrower construction directed at preventing this type of consequence. As with questions regarding the "unauthorized practice of law" in other contexts, such determinations are necessarily made on the facts of each case. See In the Matter of the Shoe Manufacturers Protective Assn., Inc., 295 Mass. 369, 372 (1936).

With these interpretations in mind, we have reviewed the five scenarios. Each involves court employees being asked for assistance in the context of their jobs. In general, the assistance needed is advice concerning court procedures. In several scenarios, the assistance involves the completion of forms for a pro se litigant. In our opinion, the employees providing the assistance described in scenarios 2, 4, and 5 would not constitute the practice of law in violation of Canon 3 (or S.J.C. Rule 3:02). Our response on this issue would not differ if the requests for assistance were made by an attorney rather than a pro se litigant.

Under a literal reading of scenario 1, we perceive potential problems. In your description of this scenario, the clerk not only identifies and describes options and provides appropriate forms and assistance in completing them, but recommends or chooses the specific manner in which the litigant should proceed. We recommend that court employees provide such guidance and information as allows the litigant to make an informed choice among procedures, leaving however, the decision to the litigant.

Portions of scenario 3 are also troublesome for similar reasons. In that scenario, in response to an inquiry from a pro se litigant, the "registry employee gives her a complaint for contempt form and tells her to fill it out." Again, in our view, it is not the role of a court employee to advise a litigant to bring a problem before the court or to suggest the specific manner of proceeding. The litigants must decide for themselves whether and how to proceed. Prior to making these decisions, however, they are entitled to receive a wide range of assistance and guidance from court employees.

You should be aware that other provisions of the Code may also be implicated in these scenarios and in other circumstances when assistance is requested from court employees. One of the principal themes underlying the canons of the Code of Professional Responsibility for Clerks of the Courts is the principle of impartiality. Your employees should be reminded that in providing help they must be evenhanded. Under Canon 4, they must be and appear to be impartial at all times. They must provide guidance and assistance in an equitable way to all parties to a proceeding.

In the opinion of the Committee, providing assistance with filling out forms and offering procedural advice clearly do not run afoul of the prohibition on the practice of law. Drafting documents, taking over a case and becoming an advocate on behalf of a litigant would clearly violate the prohibition. Other situations may need to be addressed on a case by case basis.

CPB:pg

## APPENDIX D: Sample Instructions to Litigants Before Calling the List.

### Introductory Remarks.

This is the small claims session of this court. Please listen to these instructions so that you will know what to do when your case is called. Please answer "here" when I call your name or the name of your business. The plaintiff is the person or business that brought the small claim. The defendant is the one being sued.

### If Both Litigants are Present.

First, I will give instructions on what to do if both sides are here. Essentially, you may settle the case without a trial, or you may have a trial.

Settlement or Mediation. If the defendant admits owing what is claimed, or if you think you can settle the matter between yourselves, you should talk outside the courtroom after your names are called. If you cannot reach an agreement by yourselves, but both sides feel an agreement is possible with outside assistance, the court has mediators available for this purpose. If a voluntary settlement is reached, a form will be provided and your written agreement will be the court's order in this case. As soon as the settlement is approved by the court, you will be given a copy and may depart.

Trial**.** If you cannot settle the case, you should return to the courtroom and wait for your trial. When your case is called for trial, you will be given instructions as to how to proceed by the adjudicator. Your case will either be decided today or will be "taken under advisement". If it is taken under advisement, you will be notified of the decision by mail.

### If Only One Side is Present.

Defaults**.** If, when I call your case, the plaintiff is here but the defendant is not, the plaintiff will win automatically by default. The court will review your complaint before deciding what the amount of the judgment should be. The defendant will be ordered to pay you within thirty days, and if this is not done, both parties will be required to attend a payment hearing that will be set by the court. You will receive a written judgment in the mail with additional instructions as to what will happen if you do not receive payment.

Dismissals. If, when I call your case, the defendant is here but the plaintiff is not, the case will be dismissed. You will receive a written judgment of the dismissal in the mail. Oftentimes parties who did not appear request, at a later date, that the court "vacate" the default or dismissal because they had a good excuse for not being present. The court will listen to both sides before allowing or denying these requests.

### Other Matters.

If you are here for other small claims matters (motions, payment hearings, review, etc.) you should remain in the courtroom until your case has been heard by the court. Please listen carefully for your name or the name of your business. If you do not hear your name, please let me know at the end.

**APPENDIX E Sample Instructions to Litigants Before Trial.**

For those of you who have never before been in small claims court, let me explain our procedures. My name is _____, and I am _____ of this court.

When your case is called for trial, you will be sworn in. The plaintiff - the party who is suing - will then tell me his or her story, as you would tell it to a friend. If either side has photographs or anything in writing that you wish to show the court, such as receipts, leases, or contracts, please show such evidence as you tell me your story.

Though the rules of evidence are relaxed in small claims, my sworn duty, nevertheless, is to follow the law. The most important rule of law here is that the plaintiff must prove the claim by a preponderance - a majority - of the evidence. This is like a set of balance scales: the plaintiff's proof is put on one side and the defendant's on the other. If the defendant's side is heavier, or if the scales are evenly balanced, the plaintiff loses. It does not matter how honestly and certainly the plaintiff believes he or she is right - the law says you must *prove* the claim in order to win.

Please be brief if you can, but take as much time as you need to tell me your side of the case. When you think you are through, I will ask if there is anything else you wish to tell me that you have not already told me - and please, that is the time you should tell me anything else you wish to add. After this, you then must remain quiet while this same procedure is repeated with the defendant, the person being sued.

After both sides are finished, a decision and a payment order will be entered. I may announce my decision from the bench, but you will still receive a written confirmation in the mail. If I announce that I will take the case under advisement, that means that I want to give the case some more thought, and you will be notified of my decision by mail.

Remember, when your case is called, please come forward and bring all witnesses you have here with you today. Everyone will be sworn in, and we will be ready to try your case.

(Taken from National Conference of Special Court Judges, American Bar Association, Small Claims Form Guide Book s. 28 [E.A. Rissman ed.].)