Massachusetts Rules of Appellate Procedure

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Print sources for rules:

- Annotated Laws of Massachusetts: Court Rules, LexisNexis, annual.
- Massachusetts General Laws Annotated, v.43A-43C, West Group, updated annually with pocket parts.
- Massachusetts Rules of Court, West Group, annual.
- The Rules, Lawyers Weekly Publications, loose-leaf.

Rule 32 Title

Rule 1: Scope of Rules: Definitions

(a) Scope of Rules. These rules govern procedure in appeals to an appellate court.
(b) Rules Not to Affect Jurisdiction. These rules shall not be construed to extend or limit the jurisdiction, as established by law, of the Supreme Judicial Court or the Appeals Court. All proceedings related to any appeal from: (a) a decision of a single Justice of the Supreme Judicial Court, and (b) a decision of any tribunal, appeal from which must by law be brought in the Supreme Judicial Court, shall be had only before the full Supreme Judicial Court or a single justice thereof (unless transferred to the Appeals Court by order of the Supreme Judicial Court). But these rules shall govern such proceedings, except as provided in Supreme Judicial Court Rule 2:21.
(c) Definitions. As used in these rules:
"appeal" means an appeal to an appellate court and supersedes any procedure other than reservation and report by which matters have heretofore been brought before an appellate court for review.

"Appellate Court" means the full Supreme Judicial Court, the full Appeals Court, or a statutory quorum of either, as the case may be, whichever court is exercising statutory jurisdiction over the case at bar.

"child welfare case" means any case that is before a court of competent jurisdiction pursuant to G.L. c. 119, §§ 21-39J; G.L. c.190B Parts 2 and 3; or G.L. c. 210, §§ 1-11.
"clerk" means "clerk," "register," "recorder," and their respective assistants or deputies; "clerk of the appellate division" means the clerk of the trial court from which the action was reported to the appellate division.

"first class mail" means use of first class postage prepaid, whether certified, registered, uncertified, or unregistered. Registration or certification shall not be required unless specifically stated to be necessary.

"lower court" means the single justice, court, appellate division, board, commission, or other body whose decision is the subject of an appeal; for the purpose of Rule 9, the term includes any member of the lower court.

"rescript" means the order, direction, or mandate of the appellate court disposing of the appeal. "single justice" means a single justice of whichever appellate court is exercising statutory jurisdiction over the case at bar.

(d) Construction. Words or phrases importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words importing the masculine gender may include the feminine and neuter.
Amended May 15, 1979, effective September 1, 1979; May 29, 1986, effective July 1, 1986; amended effective July 28, 1987; November 15, 1995; amended July 28, 1999, effective September 1, 1999; amended June 24, 2009, effective July 1, 2009..

Reporters' Notes (1973): The Appellate Rules, modeled almost entirely upon the Federal Rules of Appellate Procedure, drastically alter the procedure for judicial review in non-criminal cases as heretofore known in Massachusetts. Mass. R. Civ. P. 46 having eliminated the concept of the exception, all existing authority and learning pertaining to bills of exceptions are now obsolete. In addition, the Appellate Rules eradicate heretofore existing distinctions between bills of exceptions, appeals, claims of reports, and the like. The Appellate Rules are drafted to

apply to any "procedure by which matters have heretofore been brought before an appellate court for review," except reservation and report (see Mass. R. Civ. P. 64; M.R.A.P. 5). The word "appeal" by definition includes all such preexisting procedures. The Appellate Rules apply to any review by the full Supreme Judicial Court or the Appeals Court of the decision of any "lower court," which latter term is defined to include any "single justice, court, appellate division, board, commission, or other party whose decision is the subject of an appeal."

Note that in the Appellate Rules "appellate court" refers to either the full Supreme Judicial Court or the full Appeals Court, whichever is then exercising jurisdiction, and that "single justice" similarly refers to a single justice of either court.

"Rescript," a term well-known to Massachusetts practice, covers the meaning of "mandate," the term used in the Federal Rules, F.R.A.P. 41.

Reporter's Notes to July 1979 Amendment

[Rule 1(a)]

Subdivision (a) of Rule 1 is amended by the deletion of the word "civil," thereby enlarging the scope of the Rules of Appellate Procedure to encompass both civil and criminal appeals. As thus amended, the rules govern interlocutory appeals in criminal cases (G.L. c. 278, § 28E, as amended; Mass. R. Crim. P. 15 [1979]), appeals from single justice proceedings and appeals from final convictions.

Bills of exceptions (former G.L. c. 278, § 31), writs of error (former G.L. c. 250, §§ 1-2, 9-13), and the limited "appeal" from a judgment of the Superior Court based on a "matter of law apparent upon the record" (former G.L. c. 278, § 28) are superseded by an appeal under these rules by virtue of subdivision (c). The appeal available pursuant to the rules is similar in many respects to the direct appeal on the transcript previously provided by G.L. c. 278, §§ 33A-33H, but the assignment of error as a vehicle for isolating and identifying issues (G.L. c. 278, § 28D) is abolished. Reports in criminal cases are governed by Mass. R. Crim. P. 34 and Mass. R. App. P. 5.

"Lower court" as defined in subdivision (c) may include a justice of the district court department sitting in a jury-waived session. While ordinarily the only avenue for review of a judgment or order in a jury-waived session will be by way of appeal to a jury session, the Commonwealth is granted an interlocutory appeal of orders granting motions to dismiss or to suppress evidence by G.L. c. 278, § 28E, as amended, and Mass. R. Crim. P. 15(a).

Reporter's Notes (1987):

[Rule 1(b)]

This amendment deletes the reference to appeals from "a decision of the Appellate Division of the District Courts." Pursuant to G.L. c.211A, §10, as amended, review of such decisions is in the first instance by the Appeals Court.

Reporter's Notes (1995):

[Rule 1(b)]

The 1995 amendment to Mass.R.A.P. 1(b), effective November 15, 1995, provides that the Rules of Appellate Procedure are not applicable to proceedings governed by Supreme Judicial Court Rule 2:21, also effective November 15, 1995. Supreme Judicial Court Rule 2:21 regulates the procedure for appeal to the full court of a single justice's denial of relief from an interlocutory ruling in the trial court.

Reporter's Notes (1999):

[Rule 1(c)]

The 1999 amendment to Appellate Rule 1(c) was part of a comprehensive set of amendments to the Appellate Rules (Rules 1, 3, 4, 8, and 10) that had been proposed by the Supreme Judicial Court Committee on Appeals of Child Welfare Cases. The Committee's recommendations were intended to: (1) provide a uniform appeal period for child welfare cases; (2) establish a procedure for filing a notice of appeal which would eliminate the taking of appeals on behalf of absent and disinterested clients; (3) establish a procedure for the appointment of appellate counsel which makes it clear that trial counsel continues to be responsible for all trial court proceedings; (4) expedite the assembly of the record; and (5) provide notice to the trial court, for jurisdictional purposes, when appeals are entered in the appellate courts.

The amendment to Appellate Rule 1(c) defines the term "child welfare case" as it is used in the Appellate Rules.

Reporter's Notes (2009):

The 2009 amendments reflect changes resulting from the adoption of the Massachusetts Uniform Probate Code.

Rule 2: Suspension of Rules

In the interest of expediting decision, or for other good cause shown, the appellate court or a single justice may, except as otherwise provided in Rule 14 (b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. Such a suspension may be on reasonable terms.

Reporter's Notes (1973): Appellate Rule 2, substantially tracking F.R.A.P. 2, injects flexibility into the appellate structure. It permits relaxation of the rules in the interest of expedition, or for good cause, except enlarging appeal time beyond one year from the date the appeals period begins to run.

Rule 3: Appeal - How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law from a lower court shall be taken by filing a notice of appeal with the clerk of the lower court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal shall not affect the validity of the appeal, but shall be ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal. A party need not claim an appeal from an interlocutory order to preserve his right to have such order reviewed upon appeal from the final judgment; but for all purposes for which an appeal from an interlocutory order has heretofore been necessary, it is sufficient that the party comply with the requirement of Massachusetts Rules of Civil Procedure 46 or Massachusetts Rules of Criminal Procedure 22, whichever was applicable to the trial of the case in the lower court.

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a lower court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal and shall, in civil cases, designate the judgment, decree, adjudication, order, or part thereof appealed from. In child welfare cases, the notice of appeal and any request for a transcript, if required, shall be signed by the party or parties taking the appeal, unless the appellant is the minor subject of the action; a notice of appeal that is not so signed shall not be accepted for filing by the clerk.

(d) Service of the Notice of Appeal. The clerk of the lower court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record for each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the persons to whom he mails copies, with the date of mailing.

(e) Change of Counsel on Appeal in Criminal and Certain Non-criminal Cases. If the defendant in a criminal case or any party in any other proceeding, excluding child welfare cases, in which counsel is required to be made available to such party pursuant to Supreme Judicial Court Rule 3:10 was represented by counsel at trial, trial counsel shall continue to represent that party on appeal until the trial court permits him to withdraw his appearance and until an appearance is filed by substitute counsel. If trial counsel wishes to withdraw, he shall, on the day upon which the notice of appeal is filed, file a motion to withdraw. Any motion under this provision shall be marked up by the trial counsel for hearing no later than seven days after filing. If the motion to withdraw is allowed, the judge shall assign the Committee for Public Counsel Services to provide representation according to the procedures established in Supreme Judicial Court Rule 3:10.

(f) Appointment of Appellate Counsel in Child Welfare Cases. Any party to a child welfare case in which counsel was appointed pursuant to Supreme Judicial Court Rule 3:10 and who was represented by counsel at trial, shall continue to be represented by that counsel on appeal until either the trial court has appointed counsel for appellate purposes and an appearance has been filed by appellate counsel or the trial court has denied a motion to appoint counsel for appellate purposes. Trial counsel shall, on the day upon which the signed notice of appeal is filed, file, and request a hearing on, a motion to allow reasonable costs associated with the appeal. At the same time, if trial counsel is not appellate certified by the Committee for Public Counsel Services, counsel shall also file, and request a hearing on, a motion to appoint counsel for appellate purposes. Subject to the provisions of Supreme Judicial Court Rule 3:10, § 7, trial counsel shall continue to represent the party at all trial court proceedings. If the motion to appoint counsel for appellate purposes is allowed, the Committee for Public Counsel Services shall be assigned to provide representation according to the procedures established in Supreme Judicial Court Rule 3:10.

Amended May 15, 1979, effective July 1, 1979; May 29, 1986, effective July 1, 1986; amended July 28, 1999, effective September 1, 1999.

Reporters' Notes (1973):

An appeal is initiated by filing in the lower court a notice of appeal, within 30 days following the order or judgment appealed from. If the Commonwealth or any office or agency thereof is a party, however, the appeal time is extended to 60 days. After the notice of appeal has been filed, the clerk of the lower court notifies all other parties by mail of

the notice's having been filed. It is the date of the filing, however, not the date of the notice, which controls the timeliness of the appeal.

Reporter's Notes (1979):

[Rule 3(a), (c), and (e)]

The second paragraph of subdivision (a) is amended by the addition of a reference to Mass. R. Crim. P. 22, "Objections," to clarify that a party need not claim an exception to an interlocutory order adverse to his position to preserve his right to have that order subsequently reviewed on appeal.

Subdivision (b), regulating joint or consolidated appeals, is consistent with prior criminal appellate practice.

Subdivision (c) is amended to reflect the fact that in a civil case, the notice of appeal must designate the judgment, order, or part thereof which is appealed from. It would also be appropriate in an interlocutory appeal in a criminal case for the notice of appeal to designate the order from which an appeal is being taken (e.g., denial of motion to suppress, grant of motion to dismiss), but this is not required by the rule because there is seldom any question about the matter being appealed.

General Laws, c. 278, § 33B (St.1955, § 352, § 2) formerly provided that the clerk was to notify the District Attorney of a claim of appeal "forthwith." Subdivision (d) is more explicit in setting out the manner of notice and will require notification of co-defendants, if any, when a notice of appeal is filed.

Subdivision (e), "Change of Counsel on Appeal in Criminal Cases," is new and addresses the continuing responsibility of the trial attorney to provide assistance to a client beyond entry of final judgment in the trial court. See ABA Standards Relating to Criminal Appeals 21-2.2(a)(2d ed., Approved Draft, 1978). This subdivision seeks to avoid a hiatus in legal representation during a critical period when the defendant has questions as to the meaning and effect of conviction and the option of whether to appeal. ABA Standards, supra, commentary at 10.

In Pires v. Commonwealth, Mass.Adv.Sh. [1977] 2601, the Supreme Judicial Court held that a lawyer has a professional obligation to his client which goes beyond the trial of the case. The court adopted the provisions of the American Bar Association Project on Standards for Criminal Justice as the appropriate measure of the responsibility of counsel. Standard 8.2 of the Defense Function (Approved Draft 1971), provides:

"8.2 Appeal. (a) After conviction, the lawyer should explain to the defendant the meaning and consequences of the court's judgment and his right of appeal. The lawyer should give the defendant his professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. He should also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant's own choice. (b) The lawyer should take whatever steps are necessary to protect the defendant's right of appeal."

Reporter's Notes (1999):

[Rule 3(c), (e), and (f)]

The 1999 amendments to Appellate Rule 3 were part of a comprehensive set of amendments to the Appellate Rules (Rules 1, 3, 4, 8, and 10) that had been proposed by the Supreme Judicial Court Committee on Appeals of Child Welfare Cases. The purpose of the 1999 amendments is described in the 1999 Reporter's Notes to Appellate Rule 1(c).

Appellate Rule 3(c) has been amended to require that in child welfare cases, the notice of appeal must be signed by the party or parties taking the appeal unless the appellant is the minor who is the subject of the action. The clerk is directed not to accept an appeal that is not so signed. The purpose of this change is to eliminate the taking of an appeal on behalf of an absent and disinterested client.

The amendment to Appellate Rule 3(f) make it clear that until appellate counsel files an appearance, trial counsel is obligated to continue representation of the client. Even after appellate counsel has filed an appearance, trial counsel will continue to represent the party at all proceedings in the trial court.

Rule 4: Appeal - When Taken

(a) Appeals in Civil Cases. In a civil case, unless otherwise provided by statute, the notice of appeal required by Rule 3 shall be filed with the clerk of the lower court within thirty days of the date of the entry of the judgment appealed from; but if the Commonwealth or an officer or agency thereof is a party, the notice of appeal may be filed by any party within sixty days of such entry, except in child welfare cases, in which the notice of appeal shall be filed within thirty days from the date of the entry of the judgment, decree, order, or adjudication. If a notice of appeal is mistakenly filed in an appellate court, the clerk of such appellate court shall note the date on which it was received and transmit it to the clerk of the lower court from which the appeal was taken and it shall be deemed filed in such lower court on the date so noted. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within fourteen days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule whichever period last expires.

If a timely motion under the Massachusetts Rules of Civil Procedure is filed in the lower court by any party: (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) to alter or amend a judgment under Rule 59 or for relief from judgment under Rule 60, however titled, if either motion is served within ten days after entry of judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(b) Appeals in Criminal Cases. In a criminal case, unless otherwise provided by statute, the notice of appeal required by Rule 3 shall be filed with the clerk of the lower court within thirty days after entry of judgment or order appealed from; or entry of a notice of appeal by the Commonwealth; or the imposition of sentence. The running of the time for filing a notice of appeal shall be terminated as to the moving party by a motion for a new trial pursuant to Massachusetts Rules of Criminal Procedure 30 filed in the lower court within thirty days after the verdict or finding of guilt or within thirty days after imposition of sentence and the full time fixed by this rule shall commence to run and shall be computed from the date of entry of an order denying such motion.

(c) Extension of Time for Filing Notice of Appeal. Upon a showing of excusable neglect, the lower court may extend the time for filing the notice of appeal by any party for a period not to exceed thirty days from the expiration of the time otherwise prescribed by this rule. Such an extension may be granted before or after the time otherwise prescribed by this rule has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the lower court shall deem appropriate.

Amended May 15, 1979, effective July 1, 1979; July 20, 1984, effective January 1, 1985; June 7, 1985, effective July 1, 1985; amended July 28, 1999, effective September 1, 1999; March 6, 2000, effective April 3, 2000; March 22, 2013, effective May 1, 2013.

Reporter's Notes (2013).
The 2013 amendment to Appellate Rule 4(a) changed item (3) to provide that, if served within ten days after entry of judgment, a motion under Mass. R. Civ. P. 59 to alter or amend a judgment or a motion under Mass. R. Civ. P. 60 for relief from judgment will toll the time period to claim an appeal from the underlying judgment.
The language "however titled" in the amended version is intended to make clear that the substance and not the title of the motion should control. See Pentucket Manor Chronic Hospital, Inc. v. Rate Setting Commission, 394 Mass. 233, 235-236 (1985). Thus a post-judgment motion under either Mass. R. Civ. P. 59 or 60, whether titled as a motion to alter, amend, or vacate, for relief from judgment, or for reconsideration, if served within ten days, will toll the time period to file a notice of appeal.
The 2013 amendment to Mass. R. A. P. 4(a) was intended to address the confusion that sometimes arose when a post-judgment motion, denominated a motion for "reconsideration," was served within ten days after entry of judgment. Since the text of the Massachusetts Rules of Civil Procedure does not refer to motions for reconsideration, a motion for reconsideration, if served within ten days of judgment, could have been treated as a motion under Rule 59 (for new trial or to alter or amend judgment) or as a motion under Rule 60(b) (for relief from judgment). If treated as a Rule 59 motion, the motion for reconsideration would have operated to toll the time period to claim an appeal. If treated as a Rule 60(b) motion, the motion for reconsideration would not have served to toll the time period to claim an appeal. Mass. R. A. P. 4(a), as it existed prior to the 2013 amendment. The 2013 amendment to Mass. R. A. P. 4(a) eliminates this potential for confusion by tolling the time period to claim an appeal where a motion for reconsideration is served within ten days after entry of judgment.

This amendment is not intended to provide a litigant with multiple opportunities to extend the time period to claim an appeal. Assume that the defendant serves a motion for relief from judgment within ten days of entry of judgment, thereby staying the time period to claim an appeal from the judgment. Two months later, the judge enters an order denying the motion for relief. Entry of that order starts the clock running to file a notice of appeal. If the defendant moves for reconsideration of the order denying relief from judgment, the motion for reconsideration should have no effect on the time period to claim appeal from the original judgment.

A 2009 amendment to Rule 4(a)(4)(a) of the Federal Rules of Appellate Procedure similarly recognized that a motion for relief from judgment under Rule 60 tolls the time period to file a notice of appeal.

Reporter's Notes (1973):

Certain motions toll the running of the appeal time. These motions, enumerated in Appellate Rule 4, pertain to the allowance or denial of a judgment, the opening of the record, the altering or amending of a judgment, and the seeking of a new trial. The new, full appeal period begins to run from the day the court finally decides a motion in any of the foregoing classes. The time for filing an appeal may be enlarged by order of an appellate court or an appellate justice, but such extension can never exceed one year from the date of the judgment or order appealed from, see Appellate Rule 14(b).

Reporter's Notes (1979):

The first two paragraphs of former Rule 4 have been denominated subdivision (a) and are limited to civil cases.

Added to Rule 4 is the substance of subdivision (b), which enlarges the time for filing a claim of appeal in criminal cases from twenty days to thirty (see former G.L. c. 278, § 28 [St.1820, c. 79, § 4]; Superior Court Rule 65 [1974]; G.L. c. 278, § 33B [St.1955, c. 352, § 2]), and which provides that if a motion for a new trial (Mass. R. Crim. P. 30[b]) which is filed within thirty days after verdict or imposition of sentence is ultimately denied, a new thirty-day

period for filing the claim of appeal from the conviction shall commence to run. While this latter provision may appear to foster delay, it actually formalizes prior practice.

This subdivision also recognizes the defendant's right to claim an appeal from a guilty verdict or finding as well as his right to appeal from the sentence. This was intended to avoid any ambiguity as to whether a claim of appeal prior to the final judgment was out of time and ineffective. See Commonwealth v. Dascalakis, 246 Mass. 12, 19 "Sentence is final judgment in a criminal case."

The third paragraph of former Rule 4 is now subdivision (c) and is applicable to both civil and criminal appeals. Under former G.L. c. 278, § 33B, the twenty-day limit was mandatory and could not be extended by consent of the parties or by the court; an untimely claim of appeal divested the appellate court of jurisdiction. Commonwealth v. Rodrigues, 333 Mass. 501 (1956); Commonwealth v. McKnight, 289 Mass. 530, 538, 540 (1935).

See also Commonwealth v. Dorius, 343 Mass. 533 (1962) where it was held that after the time for filing the claim of appeal had expired the trial court was without jurisdiction to extend the period by allowing a motion to make the case subject to then G.L. c. 278, § 33E as amended St.1979 c. 346, § 2 which would thereby trigger a new appeal period.

See Silvia v. Laurie, 549 F.2d 892 (1st Cir. 1978) where the Court of Appeals also held the time limit for filing the claim of appeal under the Federal Rules of Appellate Procedure was jurisdictional.

[T]he time limits of [Fed.R.App.P.] 4 are not merely procedural requirements that can be waived at the discretion of the court, but rather are limits on . . . [the appellate] court's power to review decisions of the … [lower] courts. . . . While the application of this rule may lead to apparently harsh results in some cases, it serves important interests of finality. 594 F.2d at 893. Subdivision (c) permits the lower court to extend the time for filing a notice of appeal by an additional thirty days upon "a showing of excusable neglect." Such an extension, whether granted before or after the expiration of the thirty days prescribed by subdivision (b), may not enlarge the time beyond sixty days after the verdict or finding of guilt or imposition of sentence. See Silvia v. Laurie, supra. Compare Mass. R. App. P. 14(b) (Appellate court or single justice may extend time for noticing appeal up to one year after verdict or sentence).

Reporter's Notes (1985):

[Rule 4(a), second paragraph]

This amendment makes Mass. R.A.P. 4(a) conform, in part, to a 1979 federal amendment. See Fed. R.A.P. 4(a)(4). Its primary purpose is to clarify an ambiguity as to the effect of filing an appeal prior to a decision on specified timely motions under Mass. R. Civ. P. 50(b), 52(b) and 59.

Reporter's Notes (1985):

[Rule 4(a), first paragraph]

The added sentence conforms the Massachusetts Rule to the last sentence of Fed. R.A.P. 4(a)(1). The purpose is to protect appellants who mistakenly, but in otherwise timely fashion, file a notice of appeal in an appellate court rather than in the lower court.

The change from ten days to fourteen days for the filing of a cross-appeal conforms the time period to that found in Fed. R.A.P. 4(a)(3). Such conformity of time periods may aid practitioners.

Reporter's Notes (1999):

[Rule 4(a)]

The 1999 amendments to Appellate Rule 4(a) were part of a comprehensive set of amendments to the Appellate Rules (Rules 1, 3, 4, 8, and 10) that had been proposed by the Supreme Judicial Court Committee on Appeals of Child

Welfare Cases. The purpose of the 1999 amendments is described in the 1999 Reporter's Notes to Appellate Rule 1(c).

Appellate Rule 4(a) has been amended to provide for a uniform 30-day period for filing a notice of appeal in all child welfare cases. See G.L. c. 119, § 27, as amended by St. 1999, c. 3, § 11.

Reporter's Notes (2000):

[Rule 4(b), first paragraph]

Appellate Rule 4(b) was amended in 2000 in light of the Supreme Judicial Court's opinion in Commonwealth v. White, 429 Mass. 258 (1999). In White, the Court ruled that in criminal cases, "a notice of appeal of any judgment or order appealed from must be filed within thirty days after the entry of the order," even though Appellate Rule 4 may not have been clear on the matter. Specific language has now been added to Rule 4(b) to eliminate any ambiguity.

Prior to the 2000 amendment, Appellate Rule 4(b) also provided that the notice of appeal was to be filed within thirty days, unless otherwise provided by statute. The rule now states that the notice of appeal is to be filed within thirty days unless otherwise provided by statute or court rule.

Rule 5: Report of a Case for Determination

A report of a case for determination by an appellate court shall for all purposes under these rules be taken as the equivalent of a notice of appeal. Whenever a case or any part of it is reported after decision or verdict, the aggrieved party (as designated by the lower court) shall be treated as the appellant. Whenever a case or any part of it is reported without decision or verdict, the plaintiff in a civil action or the defendant in a criminal case shall be treated as the appellant. The clerk of the lower court shall serve notice of the filing of the report by mailing a copy thereof to counsel of record for each party; or if a party is not represented by counsel, to the party at his last known address.

Amended May 15, 1979, effective July 1, 1979.

Reporter's Notes (1973):

No federal analogue to Appellate Rule 5 exists. Read in conjunction with Mass. R. Civ. P. 64 (Report of Case), it prescribes the adversarial framework at the appellate level for cases reported, either after an interlocutory ruling, upon an agreed statement of facts, or on a question of law reserved by a single justice of the Supreme Judicial Court (see Mass. R. Civ. P. 64). Whatever the form of the report, no party need file a separate notice of appeal (compare Appellate Rule 3); the report itself serves that function.

Reporter's Notes (1979):

This rule is amended to provide that if a case is reported by the trial court prior to a decision or verdict, the plaintiff in a civil action or the defendant in a criminal case is to be the appellant. If a whole case or any issue arising therein is reported after a decision or verdict, the aggrieved party, as determined by the trial court, shall be designated as the appellant. As to reports in criminal cases generally, see Mass. R. Crim. P. 34 (1979) and Reporter's Notes.

Rule 6: Stay or Injunction Pending Appeal

(a) Civil Cases.

(1) Stay Must Ordinarily be Sought in the First Instance in Lower Court; Motion for Stay in Appellate Court. In civil cases, an application for a stay of the judgment or order of a lower court pending appeal, or for approval of a bond

under subsection (a) (2) of this rule, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the lower court. A motion for such relief may be made to the appellate court or to a single justice, but the motion shall show that application to the lower court for the relief sought is not practicable, or that the lower court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the lower court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other statements signed under the penalties of perjury or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk of the appellate court to which the appeal is being taken (provided that if the court be the Supreme Judicial Court, the motion shall be filed with the clerk of the Supreme Judicial Court for Suffolk County).

(2) Stay May Be Conditioned Upon Giving of Bond; Proceedings Against Sureties. Relief available in the appellate court under this rule may be conditioned upon the filing of a bond or other appropriate security in the lower court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety thereby shall submit to the jurisdiction of the lower court and irrevocably appoint the clerk of the lower court as an authorized agent upon whom any papers affecting liability on the bond or undertaking may be served. A surety's liability may be entered against the surety on motion in the lower court without the necessity of an independent action. The motion and such notice of the motion as the lower court prescribes may be served on the clerk of the lower court, who shall forthwith mail copies to the sureties if their addresses are known.

(3) Terms. Relief available in the appellate court under this rule, or denial of such relief, may be conditioned on such reasonable terms as the appellate court or single justice may impose. For failure to observe such terms, the appellate court or single justice may make such further order as it or he deems just and appropriate.

(b) Criminal Cases. A motion for a stay of execution of a sentence shall be governed by paragraph (b) of this rule and by Massachusetts Rules of Criminal Procedure 31

(1) Stay Must Ordinarily be Sought in the First Instance in Lower Court; Motion for Stay in Appellate Court. In criminal cases, an application for a stay of execution of a sentence pending appeal must ordinarily be made in the first instance in the lower court. A motion for such relief may be made to the single justice of the appellate court to which the appeal is being taken, but the motion shall show that application to the lower court for the relief sought is not practicable, or that the lower court has previously denied an application for a stay or has failed to afford the relief which the applicant requested with the reasons given by the lower court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other statements signed under the penalties of perjury or copies thereof. With the motion shall be filed such parts of the record as are relevant The motion shall be filed with the clerk of the appellate court to which the appeal is being taken (provided that if the court be the Supreme Judicial Court, the motion shall be filed with the clerk of the Supreme Judicial Court for Suffolk County).

(2) Reasonable Notice. Reasonable notice of the motion for a stay shall be given to the Commonwealth. If the motion is filed at least 30 days prior to the date the appellant's brief is due, the time for a response shall be governed by Rule

15. If the motion is filed at any other time, the Commonwealth shall have 30 days to respond. A single justice may shorten or extend the time for responding to any motion authorized by this Rule.

(3) Appealability of Single Justice Order. Finality. An order by the single justice allowing or denying an application for a stay may be appealed to the appellate court in which the appeal is pending. An order by the appellate court in which the appeal is pending, allowing or denying an application for a stay, shall be final.

(4) Revocation of Stay Pending Appeal. If a defendant fails at any time to take any measure necessary for the hearing of an appeal or report, a stay of execution of a sentence may, on motion of the Commonwealth, be revoked.

(5) Expiration of Stay. Upon the release of the rescript by the appellate court of a judgment affirming the conviction, the stay of execution of sentence automatically expires, unless extended by the appellate court.

(6) Notice of Expiration of Stay. Upon release of a rescript affirming the conviction, the clerk of the appellate court shall notify the clerk of the trial court and the parties that the conviction has been affirmed and that therefore, the stay of execution of sentence has automatically expired.

Amended December 14, 1976, effective January 1, 1977; May 15, 1979, effective July 1, 1979; June 24, 2009, effective October 1, 2009.

Reporter's Notes (1973):

Appellate Rule 6, patterned on F.R.A.P. 8, allows the court (first the lower court, then the appellate court) to grant such relief as may be necessary to preserve the rights of the parties during the pendency of an appeal. Appellate Rule 6 does not substantially alter the powers of the court under existing practice. See G.L. c. 14, § 619. City of Boston v. Santosuosso, 308 Mass. 0 , 10, 31 N.E. d 57 , 578 (1941); G.L. c. 31, § 116. Appellate Rule 6(c), which is new, codifies existing federal practice. See also Mass.R.Civ.P. 6 (c). Prior Massachusetts practice will, however continue to control stays in criminal cases. G.L. c. 78, § 8B, c. 79, §§ 4, 49A.

Reporter's Notes (1979):

Subdivision (a) of Rule 6, requiring applications or motions for stays to be ordinarily filed in the lower court in the first instance, is expanded to cover both civil and criminal cases.

Subdivisions (b) and (c) of former Rule 6 are made (b)(1) and (b)(2) of the amended rule, and are applicable only to civil cases. A new subdivision (c), relative to motions for stays of execution of sentence in criminal cases, incorporates by reference Mass. R. Crim. P. 31 (1979).

The Appeals Court in Commonwealth v. Levin, Mass. App. Ct. Adv. Sh. (1979) 857 further app. rev. denied Mass. Adv. Sh. (1979) 1610 and the Supreme Judicial Court in Commonwealth v. Allen, Mass. Adv. Sh. (1979) 1819 established the criteria for determining whether a stay of sentence pending appellate review ought to be granted. These cases establish that the same judgment and discretion as used by the lower courts in bail applications can properly be considered on questions on motions for stay. These cases acknowledge that considerations such as whether the defendant was likely to be a danger to any other person or to the community and as to the likelihood of further criminal conduct during the pendency of the appeal were appropriate.

Under these decisions the lower court is also empowered to require that the appeal present "an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal." Commonwealth v. Levin, Mass. App. Ct. Adv. Sh. (1979) 857, 860.

The Supreme Judicial Court in Allen further held that the application of this standard was open, de novo, to the full bench of the appellate court after a determination of the single justice of that court denying a stay. Subdivision (c) also establishes that a stay of execution, once granted, is always subject to being vacated if the defendant is not diligent in

prosecuting his appeal. See ABA Standards Relating to Criminal Appeals 1.5(a) & commentary at 1.5(d) (Approved Draft, 1978).

The second paragraph of subdivision (c) was added to ensure that an appeal,where a stay of sentence had been allowed, is prosecuted with reasonable dispatch under all the circumstances. It is expected that this provision will be used to vacate a stay for serious delays caused by the appellant and not for mere technical lapses which do not disrupt the schedule of the appellate court.

Reporter's Notes (2009) [The notes to the 2009 amendments were drafted by the Reporter for the Massachusetts Rules of Criminal Procedure]. This Rule was revised in 2009 to describe more fully the procedure for obtaining a stay of execution of a criminal sentence in an appellate court. It complements Rule 31 of the Rules of Criminal Procedure. The 2009 amendment clarified the appellate process for stays of execution of a criminal sentence pending an appeal. As in civil cases, requests for a stay must first be presented to the trial court, unless such an application is not practicable. Either the defendant or the Commonwealth may seek relief from a single justice of the court that will hear the appeal concerning the trial judge's decision to deny, e.g., Commonwealth v. Aviles, 422 Mass. 1008 (1996), or grant, e.g. Commonwealth v. Hodge, 380 Mass. 851 (1980), a stay. Only the parties may do so. See Hagen v. Commonwealth, 437 Mass. 374, 375 (2002) (crime victim lacks standing to request revocation of stay). In the ordinary course of events, for all but first-degree murder cases a single justice of the Appeals Court is the appropriate forum. The single justice does not review the decision of the trial judge, but considers the matter de novo. See Commonwealth v. Allen, 378 Mass. 489, 497 (1979).

Rule 6(b)(2) recognizes that it is important to give the Commonwealth adequate time to prepare a response to a motion for a stay, since that will often require substantial effort in addressing the merits of the underlying appeal.

After the single justice decides the issue, there is only one further step in the process: an appeal to the panel of the Appeals Court that will decide the merits, or the full bench of the Supreme Judicial Court if the case will be decided there. This changes prior practice, which allowed a party aggrieved by the decision of a single justice of the Appeals Court the option of seeking relief both by appealing the decision in that court and asking a single justice of the Supreme Judicial Court to entertain the matter. See e.g., Duong v. Commonwealth, 434 Mass. 1006 (2001). The appeal from the decision of the single justice may be accompanied by a motion for an expedited ruling. See e.g., Restucci v. Commonwealth, 442 Mass. 1045(2004).

As also provided in Mass. R. Crim. P. 31, a stay of execution of sentence automatically expires when the appellate court considering the appeal releases a rescript affirming the conviction, unless the appellate court decides to extend it. A rescript is "released" when it is announced to the public and the appellate court notifies the parties that the court has decided the case. Cf. Mass. R. App. P. 23 (requiring the clerk of the appellate court to mail the parties a copy of the rescript and the opinion, if any). In the ordinary course of events, the rescript "issues" twenty-eight days following the release date or upon the denial of any petition for rehearing or application for further appellate review, whichever is later. Id.

When a rescript is released affirming a conviction, the clerk of the appellate court, in addition to the obligation that Mass. R. App. P. 23 imposes, shall notify the parties and the trial court clerk that the stay of execution of sentence has automatically expired. If the defendant wishes to apply for a new stay, in order to seek a rehearing or further appellate

review, such a request should go to the appellate court that decided the case (either the panel of the Appeals Court or the full bench of the Supreme Judicial Court).

The court that decided the appeal may exercise its discretion to extend a stay of execution pending a petition for rehearing, application for further appellate review, or petition for certiorari. Unless otherwise specified, an extended stay expires when the rescript issues. The appellate court may act sua sponte or pursuant to the defendant's motion, which may be filed before the appeal is decided or after the rescript is released.

Rule 7: Disability of a Member of the Lower Court

If by reason of death, sickness, resignation, removal, or other disability, the judge or judges whose decision has been appealed to the appellate court be unable to perform the duties to be performed under these rules by the lower court, then any other judge regularly sitting in or assigned to such lower court may, on assignment by the Chief Justice or presiding judge of such lower court, perform those duties.

Reporter's Notes (1973):

This rule, which does not appear in the Federal Rules of Appellate Procedure, reads into appellate procedure the provisions of Mass. R.Civ.P. 63, and ensures that whenever the Appellate Rules require action by the lower court judge, his disability will not of itself impede the appellate process.

Reporter's Notes (1979):

Disability of the trial judge in criminal cases was formerly dealt with in Supreme Judicial Court Rule 1:10 (1975: 366 Mass. 859- 60) and Appeals Court Rule 1:10 (1975: 3 Mass. App. Ct. 803), which are superseded by the application of this rule to criminal proceedings. As to disability of the judge under the trial rules, see Mass. R. Civ. P. 63 (1974) and Mass. R. Crim. P. 38 (1979).

Rule 8: The Record on Appeal

(a) Composition of the Record on Appeal. The original papers and exhibits on file, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases. In a civil case, in an appeal from an appellate division, the original papers and exhibits shall include the report of the trial judge to the appellate division with any exhibits made a part of such report.
(b) The Transcript of Proceedings.
(1) Civil Cases, Except Child Welfare Cases: Duty of Appellant to Order; Notice to Appellee if Partial Transcript Is Ordered. Within ten days after filing the notice of appeal the appellant shall order from the court reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a

description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the lower court for an order requiring the appellant to do so. At the time of ordering, a party shall make satisfactory arrangements with the court reporter for payment of the cost of the transcript.

(2) Criminal Cases: Duty of Clerk; Duty of Court Reporter. Upon the filing of a notice of appeal, unless the parties file therewith a stipulation designating the parts of the proceedings which need not be transcribed, the clerk of the lower court, within ten (10) days, shall order from the court reporter a transcript of the proceedings and shall file a certificate of such order. The parties are encouraged to stipulate to those parts of the proceedings which are unnecessary to the appeal. Upon receipt of an order, the court reporter shall prepare one original typed transcript. The court reporter shall deliver the original typed transcript to the clerk of the lower court who shall, by means of xerography or other similar method which produces legible copies, prepare one copy thereof for each of the appellate court, the appellant, and the appellee. The clerk of the lower court shall deliver one copy each to the appellant and the appellee and shall certify that the copies of the appellant and appellee have been delivered. The clerk of the lower court shall retain custody of the original typed transcript and one copy thereof until the record is transmitted to the appellate court as provided by Rule 9(d). The Commonwealth shall pay the cost of the original of the typed transcript and a copy for the appellate court. Except as provided in Rule 8(b)(4), the cost of the copy for the appellant shall be paid for by the appellant.

(3) Electronically Recorded Proceedings, Except Child Welfare Cases.

(i) Applicability. Rule 8(b)(3) applies to proceedings which were recorded electronically on equipment under the control of the court and which were not recorded by an official court reporter. If, however, a complete transcript of the electronic recording has been produced for use by the trial court, and it or a copy is available to the parties, such transcript or copy shall be utilized in lieu of preparing another pursuant to this Rule 8(b)(3). Upon receipt of the notice of appeal in such cases, the clerk shall advise the parties of the name of the preparer of the transcript; the parties shall then follow the procedure under Rule 8(b)(1) in a civil case, or Rule 8(b)(2) in a criminal case, as if a court reporter had been present, except the appellant's time for ordering a transcript shall be extended to within ten days after appellant's receipt of the clerk's notification of the name of the preparer of the transcript.

(ii) Duties of the Appellant and of the Clerk; Selection of Transcriber. If the appellant deems all or part of the electronic recording necessary for inclusion in the record, the appellant shall, simultaneously with filing a notice of appeal, order from the clerk of the lower court, in accordance with any rule or established policy of the court, a cassette copy of the electronic recording, which is hereinafter called "the cassette." The clerk shall promptly provide the cassette, unless the provisions of the second paragraph of Rule 8(b)(3)(i) apply. If a portion of the electronic recording has already been transcribed for use by the trial court, and such transcript or a copy is available to the parties, the clerk shall, in addition to providing the cassette, at the same time advise the parties of the name of the preparer of the transcript.

Within fifteen days of receipt of the cassette from the clerk, appellant shall file in court and serve on each appellee a document which includes the date of receipt of the cassette; a designation of the parts of the cassette the appellant intends to include in the transcript; and the name, address, and telephone number of the individual or firm selected to prepare the transcript, provided that the appellant and each appellee have agreed to this choice and the appellant so states. If the appellant and appellees have not so agreed, said document shall also specifically notify the clerk to select the transcriber.

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

If such selection of an individual or firm to prepare the transcript is not included, or if the transcript is to be provided at the expense of the Commonwealth, the individual or firm shall be selected by the clerk. When the selection is made by the clerk, the individual or firm shall be selected in accordance with procedures promulgated by the Chief Administrative Justice. The clerk shall promptly notify all parties of any such selection made by the clerk. Any individual or firm selected to transcribe the record pursuant to Rule 8(b)(3) is hereinafter called "the transcriber."

If the appellant has designated the entire cassette for transcription, then within said fifteen days of receipt of the cassette from the clerk, appellant shall also send or deliver to the transcriber the cassette provided by the clerk and a written order designating the entire cassette for transcription. If the appellant has not designated the entire cassette, then after twenty days have expired from the service upon the appellee of appellant's designation of transcript, the appellant shall promptly send or deliver to the transcriber the cassette provided by the clerk and a written order which states those parts of the cassette designated by the parties for transcription. In addition, the order, whether for all or part of the transcript, shall include a statement that the original of the designated portions of the transcript should be sent to the clerk of the lower court, and shall indicate the number of copies if any, to be sent to the appellant. The appellant shall promptly file with the clerk and serve on the other parties a copy of the order placed with the transcriber. Unless the entire cassette is to be transcribed, the appellant shall, together with appellant's designation of transcript, file and serve on the appellee a statement of the issues the appellant intends to present on the appeal. The appellant shall cooperate with the transcriber by providing such information as is necessary to facilitate transcription, and, where the Commonwealth is not responsible for the cost of transcription, make satisfactory arrangements with the transcriber to pay for the trial court's original of the designated portions of the transcript and any copies ordered by the appellant for the appellant's own use.

(iii) Duties of the Appellee. If the appellee deems it necessary to have a cassette in order to consider counter-designating, or for any other purpose, the appellee shall, after receipt of the notice of appeal, promptly order the cassette from the clerk or promptly arrange with the appellant to use appellant's cassette. If the appellant has not designated and ordered the entire transcript and if the appellee deems a transcript of other portions of the proceedings to be necessary, the appellee shall within fifteen days after receipt of the appellant's designation, file in court, and serve on the appellant, a designation of such additional parts. The designation of the parts of the cassette to be transcribed should be precise and include such details as the name of the witness whose testimony has been

designated and the specific portions to be included, giving an exact quote of the beginning words and concluding words of each designated portion. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the lower court for an order requiring the appellant to do so. If the appellee desires a copy of designated portions of the transcript, the appellee shall promptly communicate to the transcriber the number of copies wanted and, in cases where the Commonwealth is not responsible for the cost of the transcript, make satisfactory arrangements with the transcriber for payment for the appellee's own copies.
The appellee shall cooperate with the transcriber by providing such information as is necessary to facilitate transcription.

(iv) Duties of the Transcriber. The transcriber shall prepare an original typed transcript of the designated portions and the requested number of copies, in accordance with the designations, and shall deliver said original to the clerk, with the following certificate of accuracy:
I, _____, do hereby certify that the foregoing is a true and accurate transcript, prepared to the best of my ability, of the designated portions of the cassette provided to me by the appellant or appellee of a trial or hearing of the _____ Division of the _____ Court Department in the proceedings of _____ v. _____, case(s) no.(s) _____ before Justice _____ on _____.

(Day and Date)

Date: _____

_____

Transcriber's Signature

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

(v) Unintelligible Portions of the Cassette. If portions of the cassette cannot be transcribed because they are unintelligible, the parties shall promptly use reasonable efforts to stipulate their content. If agreement cannot be reached, the parties shall promptly present their differences as to such portions to the trial judge who heard the testimony. The trial judge shall, if possible, settle the content of the unintelligible portions, which shall then be included in the transcript.
(vi) Transcripts Paid for by the Commonwealth. In criminal cases, the Commonwealth shall pay the cost of the original of the designated portions of the typed transcript and a copy for the appellate court. Except as provided in Rule 8(b)(4), the cost of the copy for the appellant shall be paid for by the appellant who shall make arrangements with the transcriber to pay for such copy. Whenever the Commonwealth is to pay for an original or copy of the designated portions of the transcript, each party designating any portion of the cassette for transcription shall, at the time of filing the designation, also file a certificate that the parts designated are necessary to permit full consideration of the issues on appeal. Unless one of the parties specifically requests otherwise, that part of the cassette dealing with impanelment of a jury shall not be transcribed.

(4) Cost of Transcripts for Indigents. In all cases in which counsel is required to be made available pursuant to Supreme Judicial Court Rule 3:10 the cost of any transcript for such a party shall be paid for by the Commonwealth.

(5) Child Welfare Cases

(i) Proceedings Recorded by an Official Court Reporter. On the filing of a notice of appeal, unless the parties file therewith a stipulation designating the parts of the proceedings which need not be transcribed, the clerk of the lower court on behalf of the appellant, shall order from the court reporter a transcript of the entire proceeding or of such parts of the proceeding not already on file. The clerk of the lower court shall notify all parties of the date the transcript was ordered by sending a copy of the order form to all parties. On receipt of the order the court reported shall prepare an original typed transcript for filing with the lower court and a copy for the appellant and any party who so requests. The court reporter shall deliver the original to the clerk of the lower court who shall immediately notify all parties of its receipt, and the court reporter shall deliver legible copies to the appellant and to any party who so requests.

(ii) Electronically Recorded Proceedings

(a) Applicability: Rule 8(b)(5)(ii) applies to child welfare cases which were recorded electronically on equipment under the control of the court ad which were not recorded by an official court reporter. If, however, a complete transcript of the electronic recording has been produced for use by the lower court, and it or a copy is available to the parties, that transcript or copy shall be used.

(b) Duties of the Appellant and Clerk. Upon the filing of a notice of appeal, the clerk of the lower court shall produce a cassette copy of the electronic recording. Within 10 days of production of the cassette, the clerk of the lower court shall, unless the parties file a stipulation designating the parts of the cassette which need not be transcribed, on behalf of the appellant order a transcription of the entire cassette from a transcriber selected by the clerk in accordance with procedures promulgated by the Chief Justice for Administration and Management. The clerk shall also notify all parties of the name of the transcriber and the date the cassette was sent for transcription by sending a copy of the order form to all parties.

On receipt of the order the transcriber shall prepare an original typed transcript for filing in the lower court and a copy for the appellant and any party who so requests. The transcriber shall deliver the original to the clerk of the lower court who shall immediately notify all parties of its receipt, and the transcriber shall deliver legible copies to the appellant and to any party who so requests. The appellant and appellee shall cooperate with the transcriber by providing information necessary to facilitate transcription. The transcriber shall certify the original transcript using the following certificate of accuracy:

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

Date: _____

_____

Transcriber's Signature

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

(iv) Costs. The appellant shall pay for the cost of the original transcript filed with the lower court and for any copies ordered by the appellant. If there is more than one appellant, the cost of the original and any copies shall be divided between the various appellants. Any other party who requested a copy of the transcript shall pay for its copy. For any party for whom counsel is made available pursuant to Supreme Judicial Court Rule 3:10, the cost of any transcript requested by, or on behalf of, such party shall be paid in accordance with G.L. c. 261.

(c) Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript Is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may, within thirty days after the notice of appeal is filed, file a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may file objections or proposed amendments thereto within ten days after service. Thereupon the statement and any objections or proposed amendments thereto shall be submitted to the lower court for settlement and approval and as settled and approved shall be included by the clerk of the lower court in the record on appeal.

(d) Agreed Statement as the Record on Appeal. In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may, within thirty days after the notice of appeal is filed, prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the lower court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the lower court, and as approved shall be retained in the lower court as the record on appeal.

Copies of the agreed statement shall be filed as the appendix required by Rule 18.

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the lower court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the lower court, either before or after the record is transmitted to the appellate court, or the appellate court, or a single justice, on proper suggestion or on its own motion, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to a single justice.

Amended June 27, 1974, effective July 1, 1974; amended effective February 24, 1975; amended May 15, 1979, effective July 1, 1979; June 28, 1979, effective July 1, 1979; February 17, 1983, effective April 1, 1983; May 29, 1986, effective July 1, 1986; June 23, 1986, effective July 1, 1986; October 1, 1998, effective November 2, 1998; July 28, 1999, effective September 1, 1999, June 26, 2002, effective September 3, 2002.

Reporters' Notes (1973):

Based on F.R.A.P. 10, Appellate Rule 8 describes the record on appeal, which should be carefully distinguished from the record appendix. The record consists of the original papers and exhibits, plus a transcript of the proceedings and a certified copy of the docket entries, as well as any certified copy of the lower court's final order. The record appendix (see Appellate Rule 18) is that distillation of the decision-essential portions of the record which is filed in connection with the appellate brief.

The appellant is responsible for attending to the preparation of a transcript; this transcript must be sufficiently extensive to cover all points raised by the appeal. The phrase "description of the parts of the transcript," refers to such a description as "the plaintiff's entire testimony," rather than a designation by page and line, unless a more precise description is necessary.

If no transcript was made, the appellant may prepare a statement of the evidence in the proceedings in the most expeditious manner possible; after inspection by the appellee, this statement will be submitted to the lower court for approval. The statement of issues need be only extensive enough to enable the appellee to determine the need for ordering a transcript of other parts of the testimony.

The parties may, alternatively, prepare and file an agreed statement of facts. This is similar to existing practice, see G.L. c. 231, § 111; cf. Paulino v. Concord, 259 Mass. 142, 144, 155 N.E. 870, 871 (1927).

Reporters' Notes (1975):

As originally promulgated, Appellate Rule 8 required the inclusion, in the record on appeal, of a certified copy of the order appealed from and the opinion. Because the record includes all "original papers" anyway, this requirement was superfluous. Accordingly, it has been eliminated.

Reporter's Notes (1979):

The second sentence of subdivision (a) of former Rule 8 is amended to clarify that it applies to appeals in civil cases from the Appellate Division of the District Court Department (G.L. c. 231, § 108, as amended, St.1978, c. 478, § 264) and not to the Appellate Division of the Superior Court Department for review of sentences in criminal cases (G.L. c. 278, §§ 28A-28D).

Subdivision (b) of the former rule has been divided into subdivisions (b)(1), applicable to civil cases, and (b)(2), applicable to criminal cases. Subdivision (b)(1) is identical to former 8(b). Subdivision (b)(2) is wholly new.

Consonant with practice under former G.L. c. 278, §§ 33A- 33H, a defendant is entitled to a complete transcript on appeal. Charpentier v. Commonwealth, Mass. Adv. Sh. (1978) 2163, 2172. Pursuant to (b)(2), upon the filing of a notice of appeal in a criminal case, the clerk of the lower court automatically orders from the court reporter a transcript of the proceedings out of which the appeal arises. Since counsel is no longer obligated to take this mechanical step, one point of delay under prior practice is thus eliminated. The parties may—and are encouraged by the rule to—file a stipulation as to those parts of the proceedings which are unnecessary to the appeal and which

therefore need not be transcribed. The provision for stipulations as to parts of the proceedings which need not be transcribed is not applicable to capital cases under G.L. c. 278, § 33E, as amended, because in such cases, the "entire case" is before the Supreme Judicial Court, "including a transcript of the entire proceedings." E.g., Charpentier, supra at 2173 n.9. A "capital case" is a case in which the defendant was convicted of murder in the first degree. G.L. c. 278, § 33E, as amended. See Commonwealth v. O'Brien, Mass. Adv. Sh. (1976) 2926; Mass. R. Crim. P. 2(b)(3).

When the transcript is completed, the court reporter is to deliver it to the clerk of the lower court who prepares copies thereof for the appellate court, the appellant or appellants, and the appellee or appellees. The parties' copies are delivered to them, while the original and one copy are retained by the clerk for transmission to the appellate court as part of the record (Rule 9[d]).

In the district court jury sessions, the General Laws (G.L. c. 218, § 27A(h)) provide a procedure for appointment of a court reporter to transcribe the proceedings and in the alternative for an electronic recording of the proceedings. These rules as well as G.L. c. 218, § 27A(g) provide that appeals from the district court jury sessions are to proceed in the same manner as appeals from the superior court.

Because of the unavailability of a court reporter in some cases in the district court jury sessions or where the defendant has not taken advantage of section 27A(h) it may be necessary for the clerk, who has the responsibility under this rule for the completion of the record, including the transcript, to cause a transcript to be made from an electronic recording.

After this necessary preliminary step has been taken by the district court clerk copies of the transcript are to be made and distributed as provided by this rule and rule 9(d).

The cost of preparation of the original transcript and of the copies required by this rule is borne by the Commonwealth except where the defendant is not indigent. In that case the defendant is to pay the clerk for the cost of producing his copy. The provision requiring production of the whole transcript is intended to provide for more expeditious and just disposition of questions on appeal. In the first place, the Commonwealth could not in all cases determine whether a partial transcript was adequate to serve its needs until such time as the defendant's brief was filed. Secondly, without a full transcript, appellate courts cannot resolve issues of plain error, a miscarriage of justice, or harmless error.

Subdivision (c) has been amended to enlarge the time within which a statement of the evidence or proceedings may be filed from ten to thirty days. Procedure like that provided under this subdivision has been followed by the Supreme Judicial Court in a criminal case when a transcript was unavailable. Commonwealth v. Harris, Mass. Adv. Sh. (1978) 2155.

It should be noted that the appellant may prepare and submit a statement of the evidence or proceeding from the best available means. However, as stated in Ingersoll Grove Nursing Home, Inc. v. Springfield Gas Light Co., Mass. Adv. Sh. (1979) 203, 204 a substitution is available only "if no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable." In a case in which the transcript is "made and available" the plaintiff is not entitled to substitute a statement of the evidence under subdivision (c).

Subdivision (d) however allows the parties to "prepare and sign a statement of the case" in lieu of the record. The term "statement of the evidence or proceeding" of subdivision (c) is not to be used interchangeably with "statement of the case" in subdivision (d) since the rules outline different procedures with respect to these terms.

The agreed statement permitted by subdivision (d) must now be filed within thirty days after the notice of appeal is filed; prior to this amendment no time limit was specified. The parties electing to proceed under the subdivision should notify the clerk that no transcript is to be ordered and, in addition, that the agreed statement shall be substituted for the record as defined in subdivision (a). Filing of the agreed statement as the appendix required by Rule 18 has been made mandatory.

Subdivision (e), relative to correction or modification of the record, as applied to criminal cases, is similar in operation to prior provisions for settling a bill of exceptions (G.L. c. 278, § 31 [St.1974, c. 540, § 1]) or for correcting errors in a transcript (G.L. c. 278, § 33A [St.1974, c. 540, § 2]), although much broader in the scope of relief available.

Reporter's Notes (1983):

Rule 8(b)(3) has been added to deal with tape-recorded transcripts. It is quite detailed because judges, clerks, and lawyers have complained about a lack of specificity with respect to the utilization of cassettes on appeal.

Rule 8(b)(3)(i) indicates when Rule 8(b)(3) applies. The Rule does not apply to court reporters, including voice writers, or to cases where a complete transcript has already been produced for use by the trial court, and is available to the parties. Rule 8(b)(3)(ii) gives the duties of appellants and clerks, and provides for appointment of a transcriber. A major purpose is to facilitate a speedy appeal. Consequently, an appellant must order a cassette at the time of appeal and state the date of receipt to insure that the designation is timely. Another major purpose is to reduce the number of steps required of the clerk. This rule permits the parties, if they can agree, to choose the transcriber. The appellant must inform the clerk at the time of transcript designation whether the parties have so agreed. The parties must order their copies directly from the transcriber and make their own payment arrangements; the transcriber delivers transcripts directly to them. Rule 8(b)(3)(ii), unlike 8(b)(1), does not specify when an appellant must transcribe all evidence relevant to a finding or conclusion. This is not meant to change the law, but rather leave it to the parties to determine what must be transcribed in order to protect their appeal. The Standing Advisory Committee wants to discourage unnecessary transcription.

Rule 8(b)(3)(iii) gives the duties of the appellee with respect to ordering a cassette or arranging to borrow the appellant's, counter-designation, and ordering copies. Rule 8(b)(3)(iv) describes the transcriber's duties, and the certificate which the transcriber must file. Rule 8(b)(3)(v) covers the situation where a portion of the cassette is unintelligible; it requires the parties first to attempt to stipulate the contents of such portion, and provides for the trial judge, if possible, to settle differences. Rule 8(b)(3)(vi) requires that when the Commonwealth must pay for an original transcript or copy, the designating parties must certify that they have designated only necessary portions. Again, the purpose is to reduce costs.

Rule 8(b)(3) does not have its own provision concerning enlargements of time, but is subject to the general computation and extension of time provisions contained in Appellate Rule 14.

Here is a chronology of the major steps and time periods under this rule:

1. Simultaneously with filing the notice of appeal, the appellant, if desirous of a transcript, orders the cassette. Rule 8(b)(3)(ii).

2. The clerk promptly provides the cassette (Rule 8(b)(3)(ii)), unless an entire transcript is already available; in such event, the clerk notifies the parties, and the normal designation rules in Rules 8(b)(1) or 8(b)(2) apply. Rule 8(b)(3)(i). In such event, the appellant's time for ordering a transcript is within ten days after the clerk's notification. Rule 8(b)(3)(i). The clerk also notifies the parties if there has been a previous transcription of a portion of the cassette, so that the parties may utilize the prior partial transcription if they wish. Rule 8(b)(3)(ii).

3. Within fifteen days after receipt of the cassette from the clerk, the appellant designates which portions are to be included in the transcript. Rule 8(b)(3)(ii). If the appellant wants the entire cassette transcribed, then appellant also delivers the cassette to the transcriber and places the order within said fifteen day period. Rule 8(b)(3)(ii).

4. When the appellant has not ordered the transcription of the entire transcript, the appellee has fifteen days from service of the appellant's designation to file and serve a counter-designation. Rule 8(b)(3)(iii).

5. When the appellant has not already designated the entire cassette for transcription, the appellant delivers the cassette to the transcriber and places the order promptly after twenty days have expired from service upon the appellee of the appellant's designation. Rule 8(b)(3)(ii). This, in effect, gives the appellant at least five days to deliver the cassette to the transcriber and place the order, for the appellee had to file and serve the counter-designation within fifteen days.

In summary, from the time the appellant receives the cassette from the clerk, the entire designation process takes fifteen days if appellant orders the entire cassette transcribed, and "promptly" after thirty-five days if appellant has designated less than the entire cassette.

Reporter's Notes (1998):

[Rule 8(b)(3)]

The 1998 amendment to Appellate Rule 8(b)(3) deals with appeals in proceedings that were electronically-recorded on court-controlled recording equipment and not recorded by an official court reporter.

The existing rule allows the appellant to designate either the entire cassette or only specified portions of the cassette to be transcribed for purposes of preparing the appellate record. The existing rule further provides that where less than the entire cassette is to be designated, the appellant must inform the appellee of those portions of the cassette that are to be transcribed. This allows the appellee to counter-designate additional portions of the cassette for transcription. However, the current rule does not require the appellant to inform the appellee of the issues that the appellee intends to present on the appeal, thus making it difficult for the appellee to make such counter-designation intelligently.

The 1998 amendment resolves this dilemma by requiring the appellant to file and serve on the appellee a statement of the issues together with the appellant's designation of transcript.

Reporter's Notes (1999):

[Rule 8(b)]

The 1999 amendments to Appellate Rule 8(b) were part of a comprehensive set of amendments to the Appellate Rules (Rules 1, 3, 4, 8, and 10) that had been proposed by the Supreme Judicial Court Committee on Appeals of Child Welfare Cases. The purpose of the 1999 amendments is described in the 1999 Reporter's Notes to Appellate Rule 1(c).

Appellate Rule 8(b)(1) (concerning ordering the transcript) and Rule 8(b)(3) (concerning electronically-recorded proceedings) have been made inapplicable to child welfare cases. Instead, the ordering of the transcript of the proceeding is now controlled by Rule 8(b)(5). Rule 8(b)(5) shifts the duty of ordering the cassettes and transcripts from the appellant to the clerk of the lower court. Modeled in part after the procedures applicable in criminal cases, new Rule 8(b)(5) is intended to expedite preparation of the transcript in child welfare cases.

Reporter's Notes to Appellate Rule 8(b)(2) (2002):

The 2002 amendment to Appellate Rule 8(b)(2) requires that upon the filing of a notice of appeal in a criminal case, the clerk of the lower court shall order a transcript from the court reporter within 10 days. Prior to this amendment, there was no time period prescribed for ordering the transcript.

This amendment will make the practice in criminal cases consistent with that already in existence in civil cases in Massachusetts. Appellate Rule 8(b)(1) requires that in a civil case, the appellant shall order the transcript within ten days after filing of the notice of appeal. It should be noted that Rule 10(b)(1) of the Federal Rules of Appellate Procedure likewise requires that the transcript in civil and criminal cases in federal court be ordered within ten days of the filing of the notice of appeal.

Rule 9: Assembly and Transmission of the Record: Exhibits

(a) Assembly. The clerk of the lower court as soon as may be after the filing of the notice of appeal shall place together all the original papers including the exhibits filed in the lower court, together with such other papers as thereafter become a part of the record pursuant to Rule 8. The papers shall be numbered in the order of filing and the exhibits shall be plainly marked with the number assigned in the lower court preceded by the letters "exh.". The clerk shall append to the record a list of the documents correspondingly numbered and identified with reasonable definiteness. The record so assembled by the clerk shall be suitably spindled, bound, or tied and retained by the clerk in this form until the final disposition of the appeal, except as the record or any part of it is ordered to be transmitted by the appellate court or a single justice.

(b) Exhibits. No exhibit need be reproduced for the record, except by order of an appellate court, a single justice, or the judge of the lower court. Any counsel may reproduce any exhibit in several copies for the convenience of the court. The lower court shall make such orders as it deems necessary for the preservation of exhibits, and for the reproduction of important exhibits which the appellate court should examine, and the clerk of the lower court shall transmit any exhibit to the appellate court at the request of any party made at any time after the filing of the record appendix. A party shall make advance arrangements with the clerk of the lower court for the transmission and receipt of exhibits of unusual bulk or weight. No exhibit consisting of currency, bearer securities, firearms, narcotics, or contraband articles shall be transmitted to an appellate court unless pursuant to an order of the full appellate court or a justice thereof.

(c) Appellant's Obligation.

(1) In General. In a civil or criminal case, upon request by the clerk of the lower court, the appellant shall forthwith perform any act reasonably necessary to enable the clerk to assemble the record and the clerk shall assemble a single record. The lower court or the appellate court or a single justice thereof may require the record to be assembled and the appeal to be docketed at any time.

(2) Civil Cases. Notwithstanding any other obligation which these rules may impose, but excepting electronically recorded proceedings governed by Rule 8 (b)(3), each appellant in a civil case shall, within ten days after filing a notice of appeal, deliver to the clerk of the lower court either (i) a transcript of those portions of the transcript of the lower court proceedings which the appellant deems necessary for determination of the appeal, (ii) a signed statement certifying that the appellant has ordered such portions from the court reporter, or (iii) a signed statement certifying that the appellate has not ordered and does not intend to order the transcript or any portion thereof. Upon receiving the transcript, the appellant in a civil case shall forthwith deliver it to the clerk of the lower court.

(d) Duty of Clerk; Transmission. When the record is fully assembled, the clerk of the lower court shall notify the parties and the clerk of the appellate court and shall transmit to the appellate court two certified copies of the docket entries and, in a criminal case, the original and one copy of the transcript and a list of all the exhibits. In case of an order to transmit, transmission shall be effected when the clerk of the lower court mails or otherwise forwards the record to the clerk of the appellate court. The clerk of the lower court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the appellate court.

(e) Record for Preliminary Hearing in the Appellate Court. If prior to the time the record is assembled a party desires to make in the appellate court a motion for dismissal, for a stay pending appeal or for any intermediate order, the appellate court or a single justice may, on its own motion or on motion of any party, with or without notice, order the clerk of the lower court to transmit to the appellate court such parts of the original record as the appellate court or the single justice shall deem appropriate.

Amended May 15, 1979, effective July 1, 1979; amended effective May 1, 1994, June 26, 2002, effective September 3, 2002.

Reporters' Notes (1973):

Appellate Rule 9, changing federal practice (which requires transmission of the entire record in all cases, see F.R.A.P. 11) responds to the Massachusetts practice of not sending the actual original papers to the appellate court. The rule, however, recognizes that occasionally it may be essential for such papers to be transmitted, and thus requires the clerk

to assemble all the original papers in a case, including a transcript if any, and hold them, subject to an order by the appellate court to transmit the record to that court. The appellant must take whatever action is necessary to assure assembly; failure to do so jeopardizes the appeal, see Appellate Rule 10(c).

Reporter's Notes (1979):

Subdivision (a) of Rule 9, as made applicable to criminal cases, supersedes the provisions of former G.L. c. 278, § 33C (St.1974, c. 458, § 1) relative to the preparation of the record. Subdivision (b), relative to exhibits, is amended by the addition of a sentence which restates the substance of the first sentence of former Appeals Court Rule 1:06(3) (1975: 3 Mass. App. Ct. 802) and Supreme Judicial Court Rule 1:06(3) (1975: 366 Mass. 858- 59). Subdivision (b) was previously incorporated into criminal appellate procedure by Appeals Court and Supreme Judicial Court Rules 1:06(1) (1975: 3 Mass. App. Ct. 802; 366 Mass. 858), except that "record appendix" in the appellate rule was taken to mean "record" in the context of a criminal appeal. This provision, which states that certain risk-associated exhibits are not to be transmitted to the appellate court absent an order, is applicable in civil as well as criminal cases.

Subdivision (c) is amended by limiting the forty-day time for appellants' assistance in assembly of the record to civil cases, and by requiring the appellant in a criminal case to forthwith perform any act reasonably necessary to enable the clerk to assemble the record. The provision for delivery to the clerk of the necessary parts of the transcript for inclusion in the record in civil cases is inapplicable to criminal cases since the clerk orders the transcript, makes and distributes the required copies to the parties and transmits the original and a copy to the appellate court, (Rule 8[b][2]). The entire transcript is included unless the parties stipulate otherwise (Id.).

The requirement of subdivision (d) that the clerk of the lower court transmit two copies of the docket entries to the appellate court in a criminal case conforms to procedure under former Appeals Court and Supreme Judicial Court Rules 1:09 (1975: 3 Mass. App. Ct. 802; 366 Mass. 859). Subdivision (d) additionally provides that the original and one copy of the transcript (see Rule 8[b][2]) and a list of all the exhibits (see former Appeals Court and Supreme Judicial Court Rules 1:06[3], supra) shall be transmitted with the record.

Reporter's Notes (1986):

[Rule 9(b)]

This rule, inter alia, requires the clerk of the lower court to "transmit any exhibit to the appellate court at the request of any party made at any time after the filing of the record appendix." It is important to realize, however, that the transmittal of such exhibits does not automatically permit lawyers to refer to them. Rule 18 (a) states that ". . . the court may decline to permit the parties to refer to portions of the record omitted from the appendix, unless leave be granted prior to argument." See Iverson v. Board of Appeals of Dedham, 14 Mass. App. Ct. 951 (1982).

Reporter's Notes (1994):

At several places in this Rule, and in Rule 8, the word "record" or the words "record on appeal" are used. It is critical that litigants realize that there is a profound difference between the "record" and the "appendix." The record is what the lower clerk assembles and retains "until the final disposition of the appeal, except as the record or any part of it is ordered to be transmitted by the appellate court or a single justice." Mass. R.A.P. 9(a). The appendix is what the appellant must file in accordance with Mass. R.A.P. 18. A 1993 amendment to Mass. R.A.P. 18, which was made to reflect the language of Shawmut Community Bank, N.A. v. Zagami, 411 Mass. 807, 810-812 (1992), emphasizes "the responsibility of the parties to include materials necessary to their appeal, including exhibits, in the appendix."

It is important to realize that when Mass. R.A.P. 9(b) says that "[n]o exhibit need be reproduced for the record, except by order of an appellate court, a single justice, or the judge of the lower court," it is talking about "the record" and not "the appendix." The fact that the rule goes on to say that "[a]ny counsel may reproduce any exhibit in several copies

for the convenience of the court," also does not relieve the parties of their obligation to put copies of exhibits they rely upon in the appendix in accordance with Mass. R.A.P. 18.

Reporter's Notes (1994):

[Rule 9(c)(2)]

There has been an ambiguity in Mass. R.A.P. 9(c)(2) in those cases in which there has been an electronically recorded proceeding in trial court. Rule 9(c)(2) calls for the appellant, within forty days after filing the notice of appeal, to deliver to the clerk of the trial clerk either portions of the transcript or a signed statement certifying that the appellant has ordered such portions from the court reporter. Rule 8(b)(3), covering electronically recorded proceedings, has distinct provisions for obtaining a transcript which do not mesh perfectly with Rule 9(c)(2). For instance, as the dissent of Justice O'Connor (with whom Wilkins and Greaney, JJ. joined) explained in Russell v. McOwen-Hanelt, 413 Mass. 106, 114 (1992), the appellant in that case had a minimum of fifty-six days to order transcription of the cassette, so that the forty day notice provision in Rule 9(c)(2) did not fit. Nonetheless, in that case, the majority, relying on Hawkins v. Hawkins 397 Mass. 401, 406 (1986), read Rule 9(c) to require the appellant in appeals from electronically recorded proceedings "'to deliver either a transcript or a signed statement certifying that the tapes [are) being transcribed, to the clerk or register's office, [no later than] forty days after [the] appeal was filed.'" Russell v. McOwen-Hanelt, at 109.

The Standing Advisory Committee believes that Rule 9(c)(2) should be clarified so that henceforth it does not apply to electronically recorded proceedings. There are special problems when a tape recorder rather than a stenographer has been used to record a trial. For instance, an appellant must order and receive the cassette from the lower court before the designation process can begin and a person or firm must be selected to prepare the transcript. Consequently, the requirements in Rule 8(b)(3) are different from those in Rule 9(c)(2). This amendment resolves the previous ambiguity by creating an exception from the requirements of Rule 9(c)(2) where there has been an electronically recorded proceeding covered by Rule 8(b)(3). This amendment renders inapplicable the contrary holding in Russell v. McOwen-Hanelt, 413 Mass. 106 (1992) and Hawkins v. Hawkins, 397 Mass. 401 (1986).

Reporter's Notes to Appellate Rule 9(c)(2) (2002):

Rule 9(c)(2) was amended in 2002 to reduce the time period after the filing of a notice of appeal from 40 to 10 days in which the appellant in a civil case must deliver to the clerk of the lower court either the transcript or a certification that the appellant has ordered the transcript from the court reporter.

This amendment serves to bring Rule 9(c)(2) in line with the requirement of Rule 8(b)(1) that the appellant must order the transcript within ten days of filing the notice of appeal.

A further change was made in the first sentence of Rule 9(c)(2). Prior to the 2002 amendment, that sentence required the appellant to provide to the clerk of the lower court either (1) a transcript of the proceedings which the appellant deems necessary or (2) a statement that the appellant has ordered such transcript. A third option, (iii), has been added for cases where the appellant is not ordering the transcript (or any portion thereof). The appellant, by certifying that no transcript has been ordered and that the appellant does not intend to order the transcript, will thereby put the appellee on notice that the appellee must, if a transcript is desired, take steps to order the transcript. See Rule 8(b)(1).

Rule 10: Docketing the Appeal

(a) Docketing the Appeal.

(1) Civil Cases. Within ten days after receiving from the clerk of the lower court notice of assembly of the record, or of approval by the lower court of an agreed statement, each appellant, including each cross-appellant, shall pay to the clerk of the appellate court the docket fee fixed by law, and the clerk shall thereupon enter the appeal of such appellant or cross-appellant upon the docket.

(2) Criminal Cases. Upon receipt of notice of assembly of the record, pursuant to Rule 9(d), or of approval by the lower court of an agreed statement, pursuant to Rule 8(d), the clerk of the appellate court shall enter the appeal upon the docket.

(3) In General. Upon docketing of the appeal, the clerk shall serve written notice thereof upon each party and the clerk of the lower court. Upon motion, the lower court or a single justice of the appellate court may, for cause shown, enlarge the time for docketing the appeal or permit the appeal to be docketed out of time. An appeal shall be docketed under the title given to the action in the lower court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title.

(b) Filing. The clerk of the appellate court shall file upon receipt any part of the record or any paper authorized to be filed in lieu of the record under any provisions of Rule 9, following timely docketing of the appeal. The clerk shall immediately give notice to all parties of the date of each such filing.

(c) Dismissal for Failure of Appellant in a Civil Case to Comply With Rule 9(c) or Rule 10(a). If any appellant in a civil case shall fail to comply with Rule 9(c) or Rule 10(a)(1) or (3), the lower court may, on motion with notice by any appellee, dismiss the appeal, but only upon a finding of inexcusable neglect; otherwise, the court shall enlarge the appellant's time for taking the required action. If, prior to the lower court's hearing such motion for noncompliance with Rule 9(c), the appellant shall have cured the noncompliance, the appellant's compliance shall be deemed timely.

Amended June 27, 1974, effective July 1, 1974, amended effective February 24, 1975; amended May 15, 1979, effective July 1, 1979; amended effective May 1, 1994; amended July 28, 1999, effective September 1, 1999; amended effective October 1, 2001.

Reporters' Notes (1973):

Appellate Rule 10 covers the mechanics of docketing the appeal in the appellate court.

Reporters' Notes (1975):

The amendment requires the clerk to give written notice of the docketing to counsel for each party (or to each unrepresented party directly). This ensures that all parties receive notice of the docketing date, which is the starting point for various periods under the Rules; see, e.g., Appellate Rules 11, 11.1, and 19.

In Appellate Rule 10(c) substitution of "Rule 9(c)" for "Rule 9(b)" merely corrects a previous typographical error.

Reporter's Notes (1979):

The substance of former subdivision (a) has been divided into subdivisions (a)(1), applicable to civil cases, and (a)(3), applicable to both civil and criminal cases.

Subdivision (a)(2), which provides for the automatic docketing of an appeal in a criminal case upon receipt by the clerk of the appellate court of notice of assembly of the record or approval of an agreed statement, is added.

The provision of a subdivision (a)(3) for notice to the parties of the docketing of a criminal appeal conforms to prior practice under former Appeals Court Rule 1:11 (1975: 3 Mass. App. Ct. 803) and Supreme Judicial Court Rule 1:11 (1975: 366 Mass. 860).

Since in a criminal appeal the appellant is responsible neither for initiating assembly of the record (see Rules 8[b][2], 9[c]) nor for taking any step to docket the appeal ([a][2], supra), subdivision (c) is limited in application to civil cases.

Reporter's Notes (1994):

[Rule 10(c)]

This amendment eliminates noncompliance with Mass. R.A.P. 10(a)(1) (the appellant's obligation to pay the docket fee within the ten day period described in Mass. R.A.P. 10(a)(1)) from the instances of noncompliance that can be cured prior to a hearing on a motion to dismiss for noncompliance. Noncompliance with Rule 9(c) (appellant's obligations re: assembly of the record and transmission of the transcript) can still be cured prior to a hearing for dismissal based on such noncompliance.

Many lawyers and pro se litigants relied on the previous version of the last sentence of Mass. R.A.P. 10(c) as their rationale for paying the filing fee only after there had been a motion to dismiss and before the lower court's hearing of such a motion, even though Mass. R.A.P. 10(a)(1) specifically required the payment "[w]ithin ten days after receiving from the clerk of the lower court notice of assembly of the record, or of approval by the lower court of an agreed statement . . ." Although the last sentence of Rule 10(c) seemed to permit such late payment as a matter of right, the practice in the Appeals Court was to refuse to accept a docket fee sent by the appellant subsequent to the ten day period described in Rule 10(a)(1) even if it was paid before a hearing described in Rule 10(c). The appellant who attempted to file the fee late was told that he or she must be successful on a motion to docket late in order for the Appeals Court to accept the payment, and that this motion would not ordinarily be entertained by the single justice while a motion to dismiss was pending in the trial court.

The prior wording of the last sentence of Rule 10(c) was therefore misleading to appellants who thought they had a right to pay the fee after the ten day period but before the hearing on a motion to dismiss; moreover, the practice of the Appeals Court may have been in disregard of the clear language of the same sentence. It does not make sense to have a ten day period in which to pay a filing fee which is widely ignored. Consequently, this amendment removes the excuse and automatic permission to pay the fee late and also makes the Rule in accord with the practice of the Appeals Court. This amendment in no way eliminates or alters the right of an indigent pro se litigant to obtain a waiver of the obligation to pay the filing fee.

Reporter's Notes (1999):

[Rule 10(a)]

The 1999 amendments to Appellate Rule 10(a) were part of a comprehensive set of amendments to the Appellate Rules (Rules 1, 3, 4, 8, and 10) that had been proposed by the Supreme Judicial Court Committee on Appeals of Child Welfare Cases. The purpose of the 1999 amendments is described in the 1999 Reporter's Notes to Appellate Rule 1(c).

Prior to the 1999 amendment, Appellate Rule 10(a)(3) required that upon the docketing of the appeal in the appellate court, the clerk serve written notice of the docketing upon each party. The 1999 amendment requires that the clerk of the appellate court also serve written notice on the clerk of the lower court whose decision is subject to the appeal.

It is significant to note that although the 1999 amendments were part of a package of amendments that related to child welfare appeals, the amendment to Appellate Rule 10(a)(3) applies not only to child welfare appeals, but all other appeals as well.

Reporter's Notes (2001):

[Rule 10(a)(1)]

Prior to amendment in 2001, the first sentence of Appellate Rule 10(a)(1) provided that "the appellant" was to pay the docket fee to the clerk of the appellate court within ten days after receipt of notice of the assembly of the record or approval of an agreed statement. Where there have been multiple appellants or cross-appeals, the appellate clerks have required each appellant or cross-appellant to pay a separate docket fee. The 2001 amendment makes clear that separate docket fees are required.

Rule 11: Direct Appellate Review

(a) Application; When Filed; Grounds. An appeal within the concurrent appellate jurisdiction of the Appeals Court and Supreme Judicial Court shall be entered in the Appeals Court before a party may apply to the Supreme Judicial Court for direct appellate review. Within twenty days after the docketing of an appeal in the Appeals Court, any party to the case (or two or more parties jointly) may apply in writing to the Supreme Judicial Court for direct appellate review, provided the questions presented by the appeal are: (1) questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court; (2) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the Commonwealth; or (3) questions of such public interest that justice requires a final determination by the full Supreme Judicial Court. Oral argument in support of an application will not be permitted except by order of court.

(b) Contents of Application; Form. The application for direct appellate review shall contain, in the following order: (1) a request for direct appellate review; (2) a statement of prior proceedings in the case, (3) a short statement of facts relevant to the appeal; (4) a statement of the issues of law raised by the appeal, together with a statement indicating whether the issues were raised and properly preserved in the lower court; (5) a brief argument thereon (covering not more than ten pages of typing) including appropriate authorities, in support of the applicant's position on such issues; and (6) a statement of reasons why direct appellate review is appropriate. A certified copy of the docket entries shall be appended to the application. The applicant shall also append a copy of any written decision, memorandum, findings, rulings, or report of the lower court relevant to the appeal. The application shall comply with the requirements of Rule 20.

(c) Opposition; Form. Within ten days after the filing of the application, any other party to the case may, but need not, file and serve an opposition thereto (covering not more than ten pages of typing) setting forth reason why the application should not be granted. The opposition shall not restate matters described in subdivision (b)(2) and (3) of this rule unless the opposing party is dissatisfied with the statement thereof contained in the application. The opposition shall comply with the requirements of Rule 20.

(d) Filing; Service. One copy of the application and one copy of each opposition shall be filed in the office of the clerk of the Appeals Court. An original and seventeen copies of the application and of each opposition shall be filed in the office of the clerk of the full Supreme Judicial Court. Filing and service of the application and of any opposition shall comply with Rule 13.

(e) Effect of Application Upon Appeal. The filing of an application for direct appellate review shall not extend the time for filing briefs or doing any other act required to be done under these rules.

(f) Vote of Direct Appellate Review; Certification. If any two justices of the Supreme Judicial Court vote for direct appellate review, or if a majority of the justices of the Appeals Court shall certify that direct appellate review is in the public interest, an order allowing the application (or transferring the appeal sua sponte) or the certificate, as the case may be, shall be transmitted to the clerk of the Appeals Court; upon receipt, direct appellate review shall be deemed granted. The clerk shall forthwith transmit to the clerk of the full Supreme Judicial Court all papers theretofore filed in the case and shall notify the clerk of the lower court that the appeal has been transferred.

(g) Cases Transferred for Direct Review; Time for Serving and Filing Briefs. In any appeal transferred to the full Supreme Judicial Court from the Appeals Court:

(1) If at the time of transfer all parties have served and filed briefs in the Appeals Court, no further briefs may be filed except that a reply brief may be served and filed on or before the last date allowable had the case not been transferred, or within ten days after the date on which the appeal is docketed in the full Supreme Judicial Court, whichever is later.

(2) If at the time of transfer only the appellant's brief has been served and filed in the Appeals Court the appellant may, but need not, serve and file an amended brief within twenty days after the date on which the appeal is docketed in the full Supreme Judicial Court. The appellee shall serve and file his brief within thirty days after service of any amended brief of the appellant, or within fifty days after the date on which the appeal is docketed in the full Supreme Judicial Court, whichever is later.

(3) Service and filing of a reply brief shall comply with Rule 19.

(4) If at the time of transfer to the full Supreme Judicial Court no party to the appeal has served or filed a brief, the appellant shall serve and file a brief within twenty days after the date on which the appeal is docketed in the full Supreme Judicial Court or within forty days after the date on which the appeal was docketed in the Appeals Court, whichever is later.

Amended May 15, 1979, effective July 1, 1979; amended effective July 1, 1991; April 14, 1995; January 29, 1996; amended October 30, 1997, effective January 1, 1998; June 26, 2002, effective September 3, 2002.

Reporters' Notes (1973):

Appellate Rule 11 implements the statutorily-authorized direct review by the Supreme Judicial Court of cases which would otherwise first be heard and determined in the Appeals Court; G.L. c. 211A, § 10. (For procedure subsequent to an Appeals Court decision, see Appellate Rule 27.1.) Direct review may result if: (1) The Supreme Judicial Court (or two justices thereof) shall so order, either (a) sua sponte, or (b) on application of one or more parties; or (2) The Appeals Court (or a majority of the justices thereof) shall certify that direct review is in the public interest.

The rule deals with the mechanics of application for direct review, and also prescribes the procedure governing cases accorded direct review, no matter what the means which caused such review (order by the Supreme Judicial Court ex mero motu, order on application, or certification by the Appeals Court).

Of the routes to direct review, only one—Supreme Judicial Court order after application—ought appropriately to be governed by the Appellate Rules. The other two, self-initiated exercises of judicial discretion and administration, are intracourt matters not subject to procedural regulation.

What Appellate Rule 11(a)-(d) accomplishes, therefore, is to assure appellate parties the right to put the matter before the Supreme Judicial Court and to urge direct review; the rule leaves all other means by which review may be granted out of the parties' control entirely, and completely in the dispositive power of the respective courts.

The application for direct review proceeds parallel to the usual requirements, Appellate Rule 11(e). Application does not in any way "stop the clock" with respect to normal appellate procedure. Once review is granted, however, a special timetable controls, Appellate Rule 11(g). In general, any brief already filed in the Appeals Court need not be re-filed in the Supreme Judicial Court; if no party has yet filed, the briefing schedule, proceeding as though the appeal had commenced initially in the Supreme Judicial Court, is controlled by Appellate Rule 19.

Reporter's Notes (1979):

[Rule 11(a)]

Appellate Rule 11 was previously applicable to direct appellate review in criminal cases by virtue of Supreme Judicial Court Rule 3:24, § 4(1) (1975) 366 Mass. 870, (1975) except that the words "the appeal is docketed" were taken to mean "the case is entered." That distinction is no longer viable (see Rule 10[a][2]).

Only two changes are made in the former rule. A new first sentence is added to subdivision (a), which restates the first sentence of Supreme Judicial Court Rule 3:24 supra § 3. Section 3 also provided that:

All matters preliminary to the entry of . . . appeals [within the concurrent appellate jurisdiction of the Appeals and Supreme Judicial Court] which require action by an appellate court shall be presented to and disposed of by the Appeals Court.

That requirement is implicit in Rule 11.

Secondly, the time within which an application for direct appellate review may be filed is increased from ten to twenty days after the docketing of the appeal in the Appeals Court. The remainder of the rule is unchanged.

Reporter's Notes (1991):

[Rule 11(g)(4)]

The amendment to Mass. R.A.P. 11(g)(4) reduces the time the appellant has to file a brief in a case transferred to the full Supreme Judicial Court if at the time of the transfer no party to the appeal has served or filed a brief. The new time period is "within twenty days after the date on which the appeal is docketed in the full Supreme Judicial Court or within forty days after the date on which the appeal was docketed in the Appeals Court, whichever is later." The prior rule permitted the appellant to serve and file the brief within forty days of docketing a transferred case in the Supreme Judicial Court. The amendment should help increase the number and percentage of Supreme Judicial Court cases ready for hearing each month. It also helps conform the period for filing briefs in a transferred case with the policy stated in Mass. R.A.P. 11(e) that "[t]he filing of an application for direct appellate review shall not extend the time for filing briefs. . . ."

Reporter's Notes (1996):

[Rule 11(f)]

The 1996 amendment to Mass.R.A.P. 11(f), effective January 29, 1996, is a technical amendment to that portion of the first sentence relating to certification that direct appellate review by the Supreme Judicial Court is in the public interest. The amendment provides for certification by "a majority of the justices of the Appeals Court," replacing earlier language providing for certification by "all of the justices of the Appeals Court or any majority thereof."

Reporter's Notes (1997):

[Rule 11(d), effective January 1, 1998]

The 1997 amendment to Appellate Rule 11(d) increased to seventeen the number of copies of an application for direct appellate review and of each opposition to be filed in the clerk's office of the Supreme Judicial Court. The amendment also clarified that an original is to be filed together with seventeen copies.

Reporter's Notes (1999):

The cover of applications for direct appellate review shall be white. See Appellate Rule 20(b), as amended in 1999.

Reporter's Notes to Appellate Rule 11(b) (2002):

In 2002, the Supreme Judicial Court amended Appellate Rule 11(b) to require that an application for direct appellate review contain "a statement indicating whether the issues were raised and properly preserved in the lower court" and that "a copy of any written decision, memorandum, findings, rulings, or report of the lower court relevant to the issues on appeal" be appended to the application. Having a statement regarding whether issues were raised below and a copy of the lower court's decision will serve to benefit the court's determination in considering the application for direct appellate review.

Rule 11.1: Transfer from Supreme Judicial Court

In the case of a direct appeal to the Supreme Judicial Court, within fourteen days after the appeal has been docketed, or such further time as a single justice upon motion for cause shown may allow, any party may serve and file a motion, on notice, to transfer the appeal to the Appeals Court. The motion: (a) shall not exceed five typewritten pages; (b) shall succinctly specify the grounds for transfer; and (c) shall conform to Rules 13, 14, 15, and 20(b). Within seven days after filing of the motion, any other party may serve and file an opposition to the transfer. The opposition: (a) shall not exceed five typewritten pages; (b) shall succinctly specify the reasons for opposing the transfer; and (c) shall conform to Rules 13, 14, 15, and 20(b).
No oral argument will be permitted.

Reporters' Notes (1973):

Appeals which have proceeded direct to the Supreme Judicial Court without application of a party, that is, on judicial certification or order, see Appellate Rule 11(f), have by definition not afforded the parties an opportunity to oppose direct review. (Review after application, of course, has resulted from a procedure permitting the party not applying for direct review to oppose it, Appellate Rule 11(c).) Appellate Rule 11.1 permits either party to an appeal which has been brought up to the Supreme Judicial Court without application to indicate any reason why the case should be transferred back to the Appeals Court.

Rule 12: Proceedings In Forma Pauperis

(a) Leave to Proceed on Appeal In Forma Pauperis From Lower Court to Appellate Court. Either a lower court or a single justice, for cause shown and after reasonable notice, may authorize an appeal to be prosecuted in forma pauperis, upon such reasonable terms as such court or justice may prescribe.
(b) Form of Briefs, Appendices and Other Papers. Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.
Reporters' Notes (1973):

Appellate Rule 12 regulates proceedings in forma pauperis, and works no serious change in existing practice. Unlike the cognate F.R.A.P. 24, it allows the justice entertaining the application to proceed in forma pauperis large discretion to tailor the terms of the order to the needs of the case.

Rule 13: Filing and Service

(a) Filing. Papers required or permitted to be filed in the appellate court shall be filed with the clerk. Filing may be accomplished by first class mail, either registered or unregistered, addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be docketed on the date of receipt and shall be deemed timely filed if (i) received within the time fixed for filing or (ii) accompanied by an affidavit signed by counsel of record attesting that the day of mailing was within the time fixed for filing. If a motion requests relief which may be granted by a single justice, the justice may permit the motion to be filed with him, in which event he shall note thereon the date of filing and shall thereafter transmit it to the clerk.
(b) Service of All Papers Required. Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing be served by a party or person acting for him on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.
(c) Manner of Service. Service may be personal or by first class mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by first class mail is complete on mailing.
(d) Proof of Service. Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement under the penalties of perjury of the date and manner of service and of the name of the person served, signed by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but shall require such acknowledgment or proof to be filed promptly thereafter.
Amended October 23, 1989, effective January 1, 1990.

Reporters' Notes (1973):

Appellate Rule 13 governs filing and service requirements. Papers may be filed by mail; they must be actually received by the clerk within the filing deadline, except that briefs and appendices are regarded as having been filed upon mailing so long as the most expeditious form of mailing is utilized; special delivery need not be used. Service as between parties is, if accomplished by first class mail, complete upon mailing. Personal service may be made to a responsible person in the office of counsel for the recipient.

Reporter's Notes (1990):

[Rule 13(a)]

Mass. R. A. P. 31(b) requires that "[a]ll papers filed with the clerk . . . shall be entered chronologically in the docket . . ." But prior to this amendment, Mass. R. A. P. 13(a) stated that "briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is used." This clash in language has caused some problems for clerks, including additional clerical time spent modifying computerized dockets. The amended rule requires briefs and appendices be docketed on the date of receipt, but by utilizing affidavits by counsel, continues to permit counsel to mail within the time fixed for filing, even if receipt at the clerk's office is subsequent thereto. Consequently, there will no longer be a need for asterisks or other special notations on the dockets.

Rule 14: Computation and Extension of Time

(a) Computation of Time. In computing any period of time prescribed by these rules, by order of court, or by any applicable statute, the day of the act event, or default after which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period shall extend until the end of the next day which is not a Saturday, Sunday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" means those days specified in G.L. c. 4, § 7 and any other day appointed as a holiday by the President or the Congress of the United States or so designated by the laws of the Commonwealth.

(b) Enlargement of Time. The appellate court or a single justice for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but neither the appellate court nor a single justice may enlarge the time for filing a notice of appeal beyond one year from the date of entry of the judgment or order sought to be reviewed, or, in a criminal case, from the date of the verdict or finding of guilt or the date of imposition of sentence, whichever date is later.

(c) Additional Time After Service by Mail. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period.

Amended May 15, 1979, effective July 1, 1979.

Reporters' Notes (1973):

Appellate Rule 14(a), dealing with computation of time, follows Mass. R. Civ. P. 6. By countenancing enlargement of appeal time up to one year after entry of the order or judgment appealed from, Appellate Rule 14(b) relaxes the cognate F.R.A.P. 26(b). Read together, Appellate Rules 4 and 14(b) mean that an "excusable neglect" extension may be granted only on such terms as to cause the extension to expire within the one-year period prescribed by Appellate Rule 14(b).

Reporter's Notes (1979):

[Rule 14(b)]

The only change in Rule 14 is the addition to subdivision (b) of language restricting the appellate court's power to enlarge the time within which a notice of appeal may be filed in a criminal case to no longer than one year after the date of the verdict or finding of guilt or the date of the imposition of sentence, whichever date is later. Compare Rule 4(c), which limits any extension granted by the lower court to no more than sixty days after verdict or sentence. The failure of a party to notice his appeal prior to the expiration of the thirty-day limit of Rule 4(b), or within sixty days if extended may be rectified by the appellate court, or a single justice as long as it does not extend beyond one year past verdict or sentence.

Rule 15: Motions

(a) Content of Motions; Response; Reply. Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules

governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits, or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order (for which see subdivision (b)) within 7 days after service of the motion, but motions authorized by Rule 6 may be acted upon after reasonable notice, and the appellate court or a single justice may shorten or extend the time for responding to any motion.

(b) Determination of Motions for Procedural Orders. Notwithstanding the provisions of the preceding paragraph as to motions generally, motions for procedural orders, including any motion under Rule 14(b), may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation, or modification of such action.

(c) Power of a Single Justice to Entertain Motions. In addition to the authority expressly conferred by these rules or by law, a single justice may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single justice may not dismiss or otherwise determine an appeal or other proceeding, and except that the appellate court may provide by order or rule that any motion or class of motions shall be acted upon by the appellate court. The action of a single justice may be reviewed by the appellate court.

(d) Motions for New Trial in Capital Cases. After the docketing of an appeal in a criminal case in which the defendant was convicted of murder in the first degree and until the filing of a rescript by the appellate court, a motion for a new trial pursuant to Massachusetts Rules of Criminal Procedure 30 shall be filed in the appellate court and may be remitted to the trial judge for hearing and determination at such time as the appellate court may direct.

Amended May 15, 1979, effective July 1, 1979.

Reporters' Notes (1973):

Appellate Rule 15 governs motion practice. Appellate Rule 15(c) permits a single justice to dispose of any motion except a motion to dismiss an appeal (and, of course, except as otherwise provided by the Appellate Court). For the required number of copies see Appellate Rule 19(b); for the form of motions, see Appellate Rule 20(b).

Reporter's Notes (1979):

[Rule 15(d)]

Subdivision (d), drawn from G.L. c. 278, § 33E (as amended) merely recognizes that while after docketing, a motion for a new trial (Mass. R. Crim. P. 30) is required to be filed in the appellate court, it should ordinarily be heard and determined by the trial judge (unless disabled, see Mass. R. Crim. P. 38[c]), since he is in a better position to weigh its merits. See, e.g., Commonwealth v. Grace, 370 Mass. 746 (1976). The need for familiarity with the trial proceedings may vary, however, as a function of the grounds asserted (e.g.,newly-discovered evidence as opposed to a verdict allegedly against the weight of evidence).

Rule 16: Briefs

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) In all briefs, a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.
(3) A statement of the case, which shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).
(4) The argument, which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. In a brief with more than twenty-four pages of argument, there shall be a short summary of argument, suitably paragraphed and with page references to later material in the brief dealing with the same subject matter, which should be a condensation of the argument actually made in the body of the brief, and not a mere repetition of the headings under which the argument is arranged. The appellate court need not pass upon questions or issues not argued in the brief. Nothing argued in the brief shall be deemed to be waived by a failure to argue orally.
(5) A short conclusion stating the precise relief sought.
(6) Any written or oral findings or memorandum of decision by the court pertinent to an issue on appeal included as an addendum to the brief.
(7) In cases where geographical facts are of importance, unless appropriate plans are reproduced in the printed record or record appendix, an outline plan or chalk (preferably based on exhibits in evidence) shall be included. This outline plan should be suitable for reproduction on one page of the printed law reports.
(8) The printed names, Board of Bar Overseers (BBO) numbers, addresses, and telephone numbers of individual counsel, and, if an individual counsel is affiliated with a firm, the firm name.
(b) Brief of the Appellee. The brief of the appellee shall conform to the requirements of subdivision (a)(1)-(4) and (7), except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.
(c) Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of the appellate court. Reply briefs shall comply with the requirements of Rule 16 (a)(1).
(d) References in Briefs to Parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court, or the actual names of the parties, or descriptive term such as "the employee," "the injured person," "the taxpayer," "the landlord," etc. If the name of a party has been impounded or has been made confidential by statute, rule, or court order, counsel shall preserve confidentiality in briefs and oral arguments.
(e) References in Briefs to the Record. References in the briefs to parts of the record reproduced in an appendix filed with a brief (see Rule 18(a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 18(c). If the record is reproduced in accordance with the provisions of Rule 18(f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is

made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected. No statement of a fact of the case shall be made in any part of the brief without an appropriate and accurate record reference.

(f) Reproduction of Statutes, Rules, Regulations, etc. If determination of the issues presented requires consideration of constitutional provisions, statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end.

(g) Massachusetts Citations. Massachusetts Reports between 17 Massachusetts and 97 Massachusetts shall be cited by the name of the reporter. Any other citation shall include, wherever reasonably possible, a reference to any official report of the case or to the official publication containing statutory or similar material. References to decisions and other authorities should include, in addition to the page at which the decision or section begins, a page reference to the particular material therein upon which reliance is placed, and the year of the decision; as, for example: 334 Mass. 593, 597-598 (1956). Quotations of Massachusetts statutory material shall include a citation to either the Acts and Resolves of Massachusetts or to the current edition of the General Laws published pursuant to a resolve of the General Court.

(h) Length of Briefs. Except by permission of the court, principal briefs shall not exceed fifty pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. Except by permission of the court, reply briefs shall not exceed twenty pages. Permission of the court shall not be granted unless the moving party specifies the relevant issue or issues and why such issues merit additional pages. A motion of a party to exceed the page limits stated in this rule will not be granted except for extraordinary reasons.

(i) Briefs in Cases Involving Cross Appeals. If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for the purposes of this rule and Rules 18and 19, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant.

(j) Briefs in Cases Involving Multiple Appellants or Appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(k) Required Certification; Non-complying Briefs. The last page of each brief shall include a certification by counsel, or, if a party is proceeding pro se, by the party, that the brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18(appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers). A brief not complying with these rules (including a brief that does not contain a certification) may be struck from the files by the appellate court or a single justice.

(l) Citation of Supplemental Authorities. When pertinent and significant authorities come to the attention of a party after his brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of

the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

(m) References to Impounded Material. Upon the filing of any brief or other document containing references to matters that are impounded or have been made confidential by statute, rule, or order counsel (or a party if pro se), shall file a written notice with the clerk, with a copy to all parties, so indicating. Wherever possible, counsel shall not disclose impounded material. Where it is necessary to include impounded material in a brief, the cover of the brief shall clearly indicate that impounded information is included herein.

Amended effective February 24, 1975; amended May 15, 1979, effective July 1, 1979; May 25, 1982, effective July 1, 1982; November 17, 1986, effective January 1, 1987; November 24, 1987, effective January 1, 1988, amended effective May 5, 1989; February 1, 1991; January 1, 1992; January 1, 1997; amended June 11, 1997, effective July 1, 1997; December 1, 1998, effective January 1, 1999; February 5, 2003, effective March 3, 2003; amended effective October 1, 2005.

Reporters' Notes (1973): Appellate Rule 16 establishes the form of the briefs: table of contents; statement of the issues; statement of the case; arguments; and conclusion. Appellate Rule 16(f) also requires the reproduction of relevant statutes and the like. None of the requirements will substantially change existing practice. Appellate Rule 16(e), stating the requirements in briefs for reference to the record, likewise follows existing practice. See S.J.C. Rule 1:15; Appeals Court Rule 1:15.

Reporters' Notes (1975): As originally promulgated, Appellate Rule 16(a)(4) made optional the use of a summary of argument. The new rule makes such a summary mandatory, if the brief contains more than 24 pages of argument (i.e., not including table of contents, table of cases, statutes, and authorities, statement of issues, and statement of the case). By explicit language, the summary must be something more than a mere recital of the argument headings.

Amended Appellate Rule 16(a)(4) makes explicit the longstanding principle that failure to discuss an issue in the brief may, at the discretion of the court, preclude reliance upon that point in oral argument. On the other hand, if the brief does include the question, failure to argue it orally does not waive the point.

Although earlier Massachusetts appellate citation form omitted the year of decision, the amendment to Appellate Rule 16(g) ensures that the year will be included in any citation.

Reporter's Notes (1979): [Rule 16(e)] Rule 16 was previously incorporated into criminal appellate procedure by Appeals Court Rule 1:15 (1975: 3 Mass. App. Ct. 803) and Supreme Judicial Court Rule 1:15 (1975: 366 Mass. 861). The rule is unchanged beyond amendment of subdivision (e) to reflect the fact that there may be more than one appendix in a criminal case. (Mass. R. App. P. 19[a]).

The last two sentences of subdivision (a)(4) which provide that questions or issues not argued in the brief need not be decided, but that a failure to orally argue an issue does not waive it if argued in the brief, supersede the last two sentences of former Appeals Court and Supreme Judicial Court Rules 1:13 (1972: 1 Mass. App. Ct. 889, amended 1975: 3 Mass. App. Ct. 801. 1967: 351 Mass. 738, amended, 1975: 366 Mass. 801).

Reporter's Notes (1982) : Appellate Rule 16(l) is the same as F.R.A.P. 28(j), which became effective in 1979. Its purpose is to allow a concise letter to inform the court in a non-argumentative manner of a "pertinent and significant" authority discovered after the filing of a brief or oral argument. The amendment does not authorize reargument in the disguise of a supplementary citation.

Reporter's Notes (1987): [Rule 16(c)] This amendment is to clarify that reply briefs of more than twenty pages shall contain the tables and references required of other appellate briefs of that length. Such tables and references aid opposing parties and the court. This amendment corresponds, in part, to the 1986 amendment to Fed. R.A.P. 28(c).

Reporter's Notes (1991) : [Rule 16(a)(7)]

These amendments [to Mass. R.A.P. 16(a)(7) and 20(a), final sentence, clause (5)] require individual counsel who are affiliated with a firm to include the firm name on filed briefs. Appellate judges need to know the firm names in order to determine correctly whether it is necessary to withdraw from a case.

Reporter's Notes (1997) : [Rule 16(a)(1)]

The amendment to appellate Rule 16(a)(1), effective January 1, 1997, eliminates the provision that a table of contents and a table of cases, statutes, and other authorities be included only in briefs of twenty pages or more. All briefs must include these items.

Reporter's Notes (1997) : [Rule 16(d) and (m)]

The 1997 amendments to Appellate Rule 16(d) and (m) serve as a reminder to counsel to maintain confidentiality in briefs and oral argument of any information that has been impounded or designated as confidential. For example, where the name of a person is not subject to disclosure, counsel may use a generic term such as "child" or "juvenile" or may use a pseudonym or initials.

Illustrative statutes requiring confidentiality include G.L. c. 112, § 12S (petitions by minors seeking judicial determination of maturity in connection with abortion; see also Superior Court Standing Order No. 5-81, as amended, requiring that papers "shall be designated anonymously" such as with the titles "Mary Moe" or "Mary Doe"); G.L. c. 119, § 38 (names in care and protection proceedings); G.L. c. 119, § 65 (juvenile proceedings); G.L. c. 209A, § 8 (in abuse prevention proceedings, plaintiff's address and case records involving a minor); G.L. c. 209C, § 13 (papers in paternity proceedings and a party's address); and G.L. c. 210, § 5C (adoption proceedings).

Illustrative rules providing for confidentiality include Mass. R. Civ. P. 26(c) (trade secrets and other matters in connection with discovery) and Probate Court Supplemental Rule 401 (financial statements in connection with requests for support or alimony). The Uniform Rules on Impoundment Procedure also provide a mechanism to preserve confidentiality of matters contained in case papers. Illustrative cases using pseudonyms include Care and Protection of Stephen, 401 Mass. 144, 514 N.E.2d 1087 (1987); C.C. v. A.B., 406 Mass. 679, 550 N.E.2d 365 (1990); Oscar F. v. County of Worcester, 412 Mass. 38, 587 N.E.2d 208 (1992); Adoption of Carla, 416 Mass. 510, 623 N.E.2d 1118 (1993); Doe v. Superintendent of Schools of Worcester, 421 Mass. 117, 653 N.E.2d 1088 (1995); Doe v. Purity Supreme, Inc., 422 Mass. 563, 664 N.E.2d 815 (1996); and Commonwealth v. Wotan, 422 Mass. 740, 665 N.E.2d 976 (1996).

There may be instances, however, where counsel will find it necessary to include confidential information in a brief in order to allow for full appellate review of the issue. In such instances, Rule 16(m) provides that counsel must alert the clerk's office that confidential information is contained in a filing. In this way, the rule shifts the burden to counsel to alert the clerk's office to the presence of impounded material so that the latter can take appropriate steps to safeguard the material in accordance with Supreme Judicial Court Rule 1:15, Impoundment Procedure.

These amendments, together with amendments to Appellate Rule 18, serve to preserve confidentiality of material in briefs, appendices, and oral argument.

Reporter's Notes (1999) : [Rule 16(a)]

New paragraph (6), added to Appellate Rule 16(a) effective in 1999, requires that any findings (written or oral) or memorandum of decision by the trial court pertinent to an appellate issue be included in an addendum to the appellant's brief. Although findings or a memorandum of decision are already required to be included in the appendix

to the brief (Mass. R. A. P. 18(a)), incorporating such matters in an addendum to the brief will enable a judge on appeal to locate quickly the trial court's rationale for its decision, especially where there is a multi-volume appendix.

The reference to oral findings is intended to cover the situation where the trial judge has dictated findings into the record that have been transcribed or otherwise recorded. These findings must now also be included in an addendum to the brief.

This additional requirement will not serve to reduce the maximum number of pages for a principal brief. The page limitations contained in Mass. R. A. P. 16(h) are inapplicable to an addendum to a brief.

Reporter's Notes (1999) : [Rule 16(h)]

The 1999 amendments to Appellate Rule 16(h) were made together with the updating of Appellate Rule 20, the latter governing the form of briefs and appendices. The 1999 amendments to Appellate Rule 20 deleted references to standard typographic printing in recognition of the practice that briefs today are produced through computer word processing and no longer through a typesetting and printing process. Accordingly, the page limitation for briefs produced by "standard typographic printing" of forty pages (and fifteen pages for reply briefs) has been deleted from the rule.

The existing page limitation on principal briefs produced by computer word-processing remains fifty pages, with reply briefs twenty pages.

Reporter's Notes (2003) : [Rule 16(h)]

By virtue of the 2003 amendment to Appellate Rule 16(h), a party seeking leave to file a brief with additional pages must specify the issues involved and why they require additional pages. The rule also sets forth a standard of "extraordinary reasons" for the allowance of such a motion.

Reporter's Notes Appellate Rule 16(k) (2005) : In order to reduce the number of non-complying briefs, Appellate Rule 16(k) was amended in 2005 to require a certification that the brief complies with all of the rules of court that govern briefs. Counsel should be aware that a brief that does not contain the required certification may be struck by the court for non-compliance with the rule.

Rule 17: Brief of an Amicus Curiae

A brief of an amicus curiae may be filed only (1) by leave of the appellate court or a single justice granted on motion or (2) at the request of the appellate court, except that consent or leave shall not be required when the brief is presented by the Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the appellate court or a single justice for cause shown shall grant leave for later filing, and shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons. The same number of copies of the brief of an amicus curiae shall be filed with the clerk and served on counsel for each party separately represented as required by Rule 19(b).

Amended October 30, 1997, effective January 1, 1998.

Reporters' Notes (1973) : No existing rule governs briefs of an amicus curiae. Appellate Rule 17, limiting the right to file such a brief to an amicus who has obtained leave of the full appellate court or a single justice on motion, follows existing practice. It should be noted that the Commonwealth need never obtain leave to file an amicus brief.

Reporter's Notes (1979) : Rule 17 is unchanged, its provisions having been incorporated into criminal appellate procedure by former Appeals Court and Supreme Judicial Court Rules 1:15 (1975: 3 Mass. App. Ct. 803. 366 Mass. 861).

Reporter's Notes (1997) : [Effective January 1, 1998]

The 1997 amendment to Appellate Rule 17 added a new last sentence requiring that the number of copies of an amicus brief to be filed with the appellate court and served on counsel be the same as set forth in Appellate Rule 19(b).

Rule 18: Appendix to the Briefs

(a) Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies. The appellant shall prepare and file an appendix to the briefs. In civil cases, the appendix shall contain: (1) the relevant docket entries in the proceedings below; (2) any relevant portions of the pleadings, charge, findings, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the lower court should not be included in the appendix.

In criminal cases, the appendix need not contain relevant portions of the transcript, but shall contain: (1) the relevant docket entries in the proceedings below; (2) a copy of the complaint or indictment; and (3) any paper filed in the case relating to an issue which is to be argued on appeal. Any party in a criminal case may include in an appendix to his brief any other parts of the record to which he wishes to direct the particular attention of the court.

The appendix shall include any order of impoundment or confidentiality from the lower court. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts, provided that the court may decline to permit the parties to refer to portions of the record omitted from the appendix, unless leave be granted prior to argument.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, any appendix shall be filed and served with the brief. If separately bound, the same number of copies of the appendix shall be filed with the clerk as required by Rule 19(b)for the filing of the brief, and two shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number and except as otherwise provided in subdivision (e) of this rule.

(b) Determination of Contents of Appendix in Civil Cases; Cost of Producing. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than ten days after the date on which the clerk notifies the parties that the record has been assembled, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, he shall, within ten days after receipt of the designation, serve upon the

appellant a designation of those parts. The parties shall not engage in unnecessary designation and may refer to parts of the record not included in the appendix if permitted by the appellate court or a single justice pursuant to the provisions of Rule 18(a) or 18(f). However, this does not affect the responsibility of the parties to include materials necessary to their appeal, including exhibits, in the appendix.

Where a party designates as part of the record any matter that has been impounded or has been made confidential by statute, rule, or order, the designation shall so state.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented he may so advise the appellee and the appellee shall advance the cost of including such parts. In the event of a dispute as to the parts to be included or the advance required to include them, the matter shall be settled by the lower court on motion and notice. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

(c) Alternative Method of Designating Contents of the Appendix in Civil Cases; How References to the Record May Be Made in the Briefs When Alternative Method Is Used. In civil cases, if the appellant shall so elect - with leave of the appellate court or a single justice - preparation of the appendix may be deferred until after the briefs have been filed and the appendix may be filed twenty-one days after service of the brief of the appellee. Notice of the election by the appellant to defer preparation of the appendix shall be filed and served by him within ten days after the date on which the clerk notifies the parties that the record has been assembled. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 18 shall apply, except that the designations referred to therein shall be made by each party at the time his brief is served, and a statement of the issues presented shall be unnecessary.

If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in his brief directly to pages of the appendix, he may serve and file typewritten or page-proof copies of his brief within the time required by Rule 19(a), with appropriate references to the pages of the parts of the record involved. In that event, within fourteen days after the appendix is filed he shall serve and file copies of the brief in the form prescribed by Rule 20(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

(d) Arrangement of the Appendix. The pages of the appendix shall be consecutively numbered and the parts of the record which are reproduced therein shall be set out in chronological order. The appendix shall commence with a chronologically ordered list of the parts of the record which it contains, with references to the pages of the appendix at which each part begins. When an appendix relates to two or more cases or to more than two parties, the appendix shall indicate the case to which each paper belongs and by whom it was filed. Unless the party filing the appendix

reproduces the entire transcript of testimony, he shall, preceding each portion of testimony transcript reproduced, insert a concise statement identifying:

(1) the witness whose testimony is being reproduced;

(2) the party originally calling him;

(3) the party questioning him; and

(4) the classification of his examination (direct, cross, or other).

When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page number of the original transcript at which such matter may be found may be indicated in brackets immediately before the matter which is set out, unless it already appears on the matter as set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) may be omitted. A question and its answer may be contained in a single paragraph.

(e) Reproduction of Exhibits and Transcripts. Exhibits and transcripts or portions thereof in civil cases, designated for inclusion in the appendix, may be contained in separate volumes, suitable indexed.

(1) Appeals Court. On appeals to the Appeals Court, five copies of the exhibits volume or volumes, and two copies of the transcript volume or volumes, shall be filed with the appendix and one copy of each shall be served on counsel for each party separately represented.

(2) Supreme Judicial Court. On appeal to the Supreme Judicial Court, and on further appellate review, five copies of the exhibits volume or volumes and five copies of the transcript volume or volumes shall be filed with the appendix and one copy of each shall be served on counsel for each party separately represented.

(3) Appeals transferred to the Supreme Judicial Court from the Appeals Court. In any appeal transferred to the full Supreme Judicial Court, in which copies of the exhibits and transcripts have already been filed in the Appeals Court pursuant to this rule three additional copies of the transcript volume or volumes shall be promptly filed with the clerk of the Supreme Judicial Court, unless the court by order in a particular case shall direct a lesser or greater number.

(f) Hearing of Appeals on the Original Record Without the Necessity of an Appendix. On motion, the appellate court or a single justice may, in specific cases, dispense with the requirement of an appendix and permit appeals to be heard in whole or in part on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

(g) Reproduction of Impounded Materials. If the entire case has been impounded, the cover of the appendix shall clearly indicate that the appendix is impounded. If the entire case has not been impounded, a separate appendix volume shall be filed containing the impounded material and the cover thereof shall clearly indicate that it contains impounded material.

Amended effective February 24, 1975, amended June 2, 1976, effective July 1, 1976; May 15, 1979, effective July 1, 1979; April 25, 1984, effective July 1, 1984; November 17, 1986, effective January 1, 1987, amended effective February 1, 1991; May 1, 1994; amended June 11, 1997, effective July 1, 1997; October 1, 1998, effective November 2, 1998.

Reporters' Notes (1973) : Appellate Rule 18 indicates the required contents of the appendix, preparation of which is appellant's responsibility; the appendix must be filed with appellant's brief. Appellate Rule 18(b) encourages the parties to agree as to the contents of the joint appendix. Appellate Rule 18(c) permits the parties, at the election of the appellant, with leave of the appellate court or a single justice, to defer preparation of the appendix until after the briefs have been filed; it sets out detailed regulations for appropriate pagination of the deferred appendix and consequent references in the briefs. It should be emphasized that transcript pages included in the appendix may be reproduced by Xerography or a similar process; they need not be retyped. See Appellate Rule 20(a). The procedures set out in Appellate Rule 18, although necessarily somewhat different from existing practice, should not cause any serious practitional dislocation. See S.J.C. Rule 1:22.

Reporters' Notes (1975) : The amendment to Appellate Rule 18(d) ensures that in a multiparty appeal, each paper appearing in the reproduced appendix bears sufficient identification to permit the reader easily to understand the document's particular genesis and significance.

Reporters' Notes (1976) :[Rule 18(d)]

The amendment, which carries forward the changes effected in February, 1975, seeks to ensure legibility of the appendix. It explicitly requires that the pages be consecutively numbered, and that, whenever the appendix contains less than the entire transcript, any excerpt will bear adequate identifying matter.

Reporter's Notes (1979) : [Rule 18(a), (b), and (c)]

A major change in criminal appellate procedure is worked by the application of Rule 18, as amended, to criminal cases. Under prior practice, after the record was assembled by the clerk, he would prepare a "summary of the record" which included a copy of the indictment or complaint and copies of pleadings and motions designated by the parties (former G.L. c. 278, § 33C [St.1974, c. 458, § 1]). This summary, in the required number of copies (former G.L. c. 278, § 33 [St.1978, c. 478, § 308]; Appeals Court and Supreme Judicial Court Rules 1:01 [1975: 3 Mass. App. Ct. 801-02. 366 Mass. 858, amended March 2, 1978]) was reproduced at the expense of the Commonwealth. The summary, together with two copies of the transcript and the assignment of errors (former G.L. c. 278, § 33D [St.1974, c. 458, § 2]), constituted the record on appeal (former G.L. c. 278, § 33E [St.1974, c. 457]). Under Rule 8(a), as amended, the record on appeal now consists of the original papers and exhibits on file, the transcript and a copy of the docket entries. The entire record is not transmitted to the appellate court except upon that court's order (Rule 9[a], [d]). The place of the summary of the record is taken by an appendix to the briefs, the contents of which are described in Rule 18(a). Responsibility for preparation of the appendix (properly "record appendix") rests with the appellant. If the appellee wishes to direct the particular attention of the court to parts of the record not contained in the appendix prepared by the appellant, he may prepare and file with his brief a supplemental appendix.

As in civil cases, the record appendix "is that distillation of the decision-essential portions of the record [on appeal]." Mass. R. App. P. 8, Reporter's Notes [1974]).

Subdivision (a) is changed by reducing from twenty-five to fifteen the number of copies of the appendix required to be filed, and, as amended, applies to both civil and criminal cases.

Subdivisions (b) and (c) are limited in application to civil cases.

Subdivision (d) restates in part the requirements of former Appeals Court and Supreme Judicial Court Rules 1:01, supra, relative to the contents of the record appendix and designation of the papers in a record.

Subdivisions (e) and (f) are unchanged.

Reporter's Notes (1984) : Under previous Mass. R. A. P. 18(e) a party on appeal could put "exhibits designated for inclusion in the appendix" in "a separate volume, or volumes" and then file only "five copies," plus serve one copy "on counsel for each party separately represented." This reduced the number of copies of exhibits otherwise required

under Mass. R. A. P. 18(a). The present amendment to Mass. R. A. P. 18(e) adds "transcripts or portions thereof in civil cases" to "exhibits," to further decrease the cost of appeals and reduce the number of documents which must be handled and stored by appellate courts.

The reference to Mass. R. A. P. 18(e), which has now been added to Rule 18(a), is to remind counsel to check Rule 18(e) in order to consider whether they wish to reduce the required copies of exhibits and "transcripts or portions thereof in civil cases" from fifteen, plus two for "counsel for each party separately represented," to five, plus one copy for such counsel. This change also makes clear that the "five copies" option in Rule 18(e) is instead of, and not in addition to, the "fifteen copies" otherwise required by the provisions of Rule 18(a).

These amendments do not alter the rules in criminal cases, which obligate the clerk of the lower court to transmit to the appellate court the "original and one copy of the transcript and a list of all the exhibits" and provide that ". . . the appendix need not contain relevant portions of the transcript . . ." (Mass. R. A. P. 9(d) and 18(a)).

Reporter's Notes (1987) : [Rule 18(a)]

This amendment corresponds to a 1986 amendment to Fed. R.A.P. 30(a). As the Committee Note to that amendment suggests, the inclusion of memoranda of law can make an appendix bulky and less useful to the appellate court, and also increase litigation costs. "There are occasions when such trial court memoranda have independent relevance in the appellate litigation. For instance, there may be a dispute as to whether a particular point was raised or whether a concession was made in the . . . [lower court]. In such circumstances, it is appropriate to include pertinent sections of such memoranda in the appendix."

Reporter's Notes (1991) : [Rule 18(a)]

This amendment reduces the number of copies of the appendix required to be filed in the Appeals Court from fifteen to the numbers of copies of the brief required under Mass. R.A.P. 19(b). For example, unless an exception applies, a party is required to file seven copies of both the briefs and the appendix in the Appeals Court and fifteen copies in the Supreme Judicial Court. The reasons for the reduction are explained in the Reporter's Notes to Amended Rule 19(b).

Reporter's Notes (1994) : [Rule 18(b)]

The prior language in Mass. R.A.P. 18(b) stated that "[i]n designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation." Since the parties have the obligation in Rule 18(a) and (b) to designate portions of the record upon which they will rely, and in civil cases must include relevant portions of the transcript, it was unclear what it meant "to have regard for the fact that the entire record is always available to the court." This phrase was particularly ambiguous because the parties in civil cases have no right to rely upon portions of the transcript that are not designated. Rules 18(b) and 18(f), which under some circumstances permit the parties to rely on parts of the record that have not been included in the appendix, specifically refer to leave granted prior to argument or a motion in advance granted by the appellate court or a single justice. The new language is in keeping with the normal expectation of appellate judges that the parties will provide appellate courts with an appendix which includes the materials upon which they rely. See Shawmut Community Bank, N.A. v. Zagami, 411 Mass. 807, 810-812 (1992).

Reporter's Notes (1997) : [Rule 18(a), (b) and (g)]

The 1997 amendment to Appellate Rule 18(a) requires that where any matter has been impounded or made confidential in the lower court, a copy of the lower court order of impoundment, if any, be included in the appendix. The amendment to Appellate Rule 18(b) requires that where such matter is to be included in the record, the fact that the matter has been impounded or made confidential be indicated in the designation of the record.

The amendment to Appellate Rule 18(g) places the burden on counsel to inform the appellate clerk's office that confidential information is contained in an appendix and to prepare a separate appendix volume in instances where less than the entire case has been impounded. The purpose of this amendment, as is the purpose of the simultaneous amendments to Appellate Rules 16(d) and (m), is to facilitate the work of the clerk's office in maintaining the confidentiality of information filed in the appellate court. See Reporter's Notes to Appellate Rules 16(d) and (m).

Reporter's Note (1998) : [Rule 18(e)]

This amendment is intended to further decrease the cost of appeals and further reduce the quantity of documents which must be handled and stored by the appellate courts. In the Appeals Court, the number of transcript copies in civil cases (if separately bound) has been reduced to two, which is the same requirement as in criminal cases (see Mass. R.A.P. 9(d)). If a case is transferred to the Supreme Judicial Court after the filing of a reduced number of copies in the Appeals Court, three additional copies of the transcript must be filed in the Supreme Judicial Court.

Rule 19: Filing and Serving of Briefs and Motions

(a) Time for Serving and Filing Briefs. Except as provided in section (d) of this rule, and in Rule 11(g)(4) concerning the filing of briefs on direct appellate review, and in Rule 27.1(f) concerning the filing of briefs on further appellate review, the appellant shall serve and file his brief within 40 days after the date on which the appeal is docketed in the appellate court. The appellee shall serve and file his brief within thirty days after service of the brief of the appellant. The appellant may serve and file a reply brief within fourteen days after service of the brief of the appellee, but, except by leave of the appellate court or a single justice, for good cause shown, a reply brief must be filed at least three days before the first day of the sitting at which the case is in order for argument.

(b) Number of Copies to Be Filed and Served.

(1) Appeals Court. On appeals to the Appeals Court, seven copies of each brief shall be filed with the clerk, unless the court by order in a particular case shall direct a lesser number, and two copies shall be served on counsel for each party separately represented.

(2) Supreme Judicial Court. On appeal to the Supreme Judicial Court, an original and seventeen copies of each brief shall be filed with the clerk, unless the court by order in a particular case shall direct a lesser or greater number, and two copies shall be served on counsel for each party separately represented.

(3) Appeals transferred to the Supreme Judicial Court from the Appeals Court. In any appeal transferred to the full Supreme Judicial Court, in which briefs have already been filed in the Appeals Court, eleven additional copies of each brief shall be promptly filed with the clerk of the Supreme Judicial Court, unless the court by order in a particular case shall direct a lesser or greater number.

(c) Consequence of Failure to File Briefs. If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file his brief, he will not be heard at oral argument except by permission of the appellate court.

(d) Rule for Appeals Pursuant to Massachusetts General Laws Chapter 278, sec. 33E.

(1) In the case of a direct appeal by an appellant who has been convicted of first degree murder, the appellant shall within one hundred and twenty days after the date on which the appeal is docketed in the Supreme Judicial Court: (1) serve and file the appellant's brief; (2) serve and file a motion for new trial; or (3) for good cause shown, seek a further enlargement of time for filing a brief or a motion for new trial. The commonwealth shall serve and file its brief

within ninety days after service of the brief of the appellant. The appellant may serve and file a reply brief within the thirty days after service of the brief of the Commonwealth.

(2) If a motion for new trial is remanded to the Superior Court, the direct appeal of the conviction shall be stayed pending decision on the motion for new trial. The matter shall be heard and determined expeditiously in the Superior Court. The appellant shall file with the Clerk of the Supreme Judicial Court for the Commonwealth status reports at thirty-day intervals. An appeal by the defendant from the denial of a motion for new trial shall be consolidated with the direct appeal. An appeal by the Commonwealth or by the defendant from the determination of a motion for new trial shall have the same docket number as the direct appeal. The Clerk of the Supreme Judicial Court for the Commonwealth shall establish a briefing schedule.

Amended May 15, 1979, effective July 1, 1979; amended effective February 1, 1991; July 1, 1991; amended October 30, 1997, effective January 1, 1998; amended July 28, 1999, effective October 1, 1999; amended February 26, 2004, effective April 1, 2004.

Reporters' Notes (1973) : Appellate Rule 19 sets the time table for the filing of briefs. Appellant must file his brief within 40 days after the docketing of the appeal (which occurs ten days after the record is assembled, see Appellate Rule 10(a); assembly occurs "as soon as may be after the filing of the notice of appeal," Appellate Rule 9(a)). Thus appellant's brief ordinarily must be filed approximately 50 days after the filing of his notice of appeal, (plus however long the lower court clerk requires for assembling the record). Appellee must file his brief within 30 days after service of appellant's brief. The appellant may serve a reply brief within 14 days after service of the appellee's brief. Although Appellate Rule 19 somewhat enlarges previous appellate timetables, see S.J.C. Rule 1:16 and Appeals Court Rule 1:16, it should occasion no unusual difficulties.

Reporter's Notes (1979) : [Rule 19(b)]

There is no change in the substance of subdivision (a), but applying the rule to criminal appeals does enlarge the times for filing of the appellant's brief found in former Appeals Court and Supreme Judicial Court Rules 1:16 (1975: 3 Mass. App. Ct. 804. 366 Mass. 861- 62) from twenty-eight to forty days after docketing (Mass. R. App. P. 10[b]). Further, under the former court rules, the appellee's brief was required to be filed within forty-nine days after entry of the case, while up to seventy days after docketing is allowed by this rule (within thirty days after service of appellant's brief). Thus, in the usual appeal, the defendant's brief is due forty days after docketing and the Commonwealth's brief thirty days thereafter. The abolishing of assignments of error (former G.L. c. 278, § 33D [St.1974, c. 458, § 2]) eliminate one step in prior appellate procedure which generated a great deal of delay. Section 33D of chapter 278 required that assignments were to be filed within thirty days after receipt of notice of the completion of the summary of the record (G.L. c. 278, § 33C [St.1974, c. 458, § 1]), but that time could be extended by a justice of an appellate or lower court. Much of the delay was attributable to the fact that assignments could not be prepared until the trial transcript had been received and reviewed for error.

Appeals Court and Supreme Judicial Court Rules 1:16 permitted either party to file a reply brief; under Rule 19, only the appellant may do so. Twenty-five copies of each were required to be filed by both the former court rules and by Appellate Rule 19(b). Subdivision (b) has been amended to reduce that number to fifteen, the reduction being applicable in civil and criminal cases alike. The requirement in subdivision (b) that two copies of briefs be served upon each party separately represented is consistent with former Appeals Court and Supreme Judicial Court Rules 1:16.

Reporter's Notes (1991) : [Rule 19(b)]

Experience has demonstrated that seven copies of briefs are needed by the Appeals Court and fifteen by the Supreme Judicial Court. This amendment, reducing the number of copies from fifteen in the Appeals Court, should save money

for the parties and the Commonwealth, as well as storage space for the court. When a case is transferred from the Appeals Court to the Supreme Judicial Court, in which briefs have already been filed, the clerk of the Appeals Court must transmit the seven copies of the briefs already filed (Mass. R.A.P. 11(f)), and the parties must promptly deliver an additional eight copies to the clerk of the Supreme Judicial Court (Mass. R.A.P. 19(b)(3)).

Reporter's Notes (1991) : [Rule 19(a)]

The amendment to Mass. R.A.P. 19(a), by adding "[e]xcept as provided in Rule 11(g)(4) concerning the filing of briefs on direct appellate review," alerts the appellant to the different time period for the filing of briefs in direct appellate review cases.

Reporter's Notes (1997) : [Rule 19(b), effective January 1, 1998]

The 1997 amendments to Appellate Rule 19(b) were prompted by the need for additional copies of filings to accommodate the practice in which all seven Justices of the Supreme Judicial Court sit on many cases.

Appellate Rule 19(b)(2), dealing with appeals to the Supreme Judicial Court, was amended to increase to seventeen the number of copies of each brief to be filed with the clerk of the Supreme Judicial Court, unless otherwise ordered. The amendment also clarified that an original is to be filed together with the seventeen copies.

Appellate Rule 19(b)(3), dealing with appeals transferred to the Supreme Judicial Court from the Appeals Court in cases where briefs had already been filed in the Appeals Court, was amended to increase to eleven the number of additional copies to be filed with the clerk of the Supreme Judicial Court, unless otherwise ordered.

Reporter's Notes (1999) : [Rule 19(d)]

The 1999 amendments added new Appellate Rule 19(d) to deal with direct appeals to the Supreme Judicial Court from first-degree murder convictions pursuant to G.L. c. 278, § 33E. The changes to Appellate Rule 19 were based on recommendations made by the Ad Hoc Supreme Judicial Court Committee on Appeals in Cases of Murder in the First Degree, a committee consisting of defense attorneys and prosecutors who handle first degree murder appeals. The major purpose of the amendments was to establish realistic time periods for the briefing of such appeals.

Paragraph (1) of Appellate Rule 19(d) substantially lengthens the time period for the service and filing of briefs that is provided for cases other than first-degree murder appeals in Appellate Rule 19(a). The time period for the appellant's brief has been increased from 40 days to 120 days; the time period for the Commonwealth's brief has been increased from 30 days to 90 days (and any reply brief by the appellant to be served and filed within 30 days). A defendant must serve and file a motion for new trial within 120 days of docketing the appeal in the Supreme Judicial Court.

Paragraph (2) of Appellate Rule 19(d) provides for a stay of the direct appeal in the event the Supreme Judicial Court remands to the Superior Court a motion for new trial. In such event, the appellant must file status reports with the Clerk of the Supreme Judicial Court for the Commonwealth every 30 days. An appeal by the defendant from the Superior Court judge's denial of a motion for new trial is to be consolidated with the direct appeal under the same docket number. In such a case, the Clerk of the Supreme Judicial Court will establish the schedule for briefing.

Reporter's Notes (2004) : [Rule 19(a)]

The first sentence of Appellate Rule 19(a) has been amended to be consistent with the simultaneous amendment to Appellate Rule 27.1(f). As amended in 2004, Appellate Rule 27.1(f) provides that upon further appellate review in the Supreme Judicial Court, a party may rely on the brief filed in the Appeals Court or may request permission to file a new brief in lieu of the Appeals Court brief.

Rule 20: Form of Briefs, Appendices and Other Papers

(a) Form of Briefs and the Appendix. Except on order of the appellate court or a single justice, or if filed on behalf of a party allowed to proceed in forma pauperis, all briefs and appendices shall be produced by any duplicating or copying process which produces a clear black image on white paper. However produced, the page shall be eight and one-half inches in width and eleven inches in height. Pages shall be firmly bound at the left by saddle-wiring, side-wiring, stapling, or sewing. If side-wired or sewn, a strong paper cover shall be used. A transcript of testimony or a report of evidence may be included as part of the appendix and may be reproduced by Xerography or a similar process. No single volume of the appendix shall be more than one and one-half inches thick. The text of appendices may appear on both sides of the page.

The following rules shall govern the format of text on a page for all briefs:

(1) The top and bottom margins shall be at least one inch. The left and right margins shall be at least one and one-half inches. Thus, the text area should not be more than five and one-half inches in width no more than nine inches in height. Page numbers may appear in the margin.

(2) The typeface shall be a monospaced font (such as pica type produced by a typewriter or a Courier font produced by a computer word processor) of 12 point or larger size and not exceeding 10.5 characters per inch.

(3) Text shall be double-spaced, except that argument headings, footnotes and indented quotations may be single-spaced. For purposes of this rule, single spacing means not more than six lines of text per vertical inch; double spacing means not more than three lines of text per vertical inch and not more than twenty-seven double-spaced lines on a page.

(4) The text may appear on both sides of the page.

Briefs or appendices not in substantial compliance with these rules shall not be received unless the appellate court or a single justice shall otherwise order. The cover of the brief of the appellant shall be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately bound, shall be white. The front covers of the briefs and appendices, if separately produced, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 10(a)); (3) the nature of the proceeding in the court (e.g., Appeal; Application for Review) and the name of the court, agency, or board below; (4) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the names, Board of Bar Overseers (BBO) numbers, addresses, telephone numbers, and e-mail addresses if any of counsel representing the party on whose behalf the document is filed, and, if an individual counsel is affiliated with a firm, the firm name.

(b) Form of Other Papers. Petitions for rehearing shall be produced in a manner prescribed by subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten in pica type upon opaque, unglazed paper eight and one half by eleven inches in size. Lines of typewritten text shall be double spaced. Consecutive sheets shall be attached at the left margin. Carbon copies may be used for filing and service if they are legible.

A motion or other paper addressed to the court shall contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper; said caption shall appear on the first page, typed so as to be legible.

The cover of applications for direct appellate review and for further appellate review shall be white.

Such motion or paper shall contain, at the end thereof, the names, Board of Bar Overseers (BBO) numbers, addresses, and telephone numbers of counsel, if any, representing the party on whose behalf the motion or paper is filed, and, if an individual counsel is affiliated with a firm, the firm name.

Amended effective February 24, 1975; February 1, 1991; January 1, 1992; amended December 1, 1998, effective January 1, 1999; March 5, 2010, effective May 1, 2010..

Reporters' Notes (1973) : Appellate Rule 20 permits briefs and appendices to be reproduced either by printing or by any duplicating process which produces a clear black image on white paper. Thus briefs may be xeroxed. However produced, briefs must be firmly bound or stapled, and must ordinarily bear color-coded covers: blue for the appellant; red for the appellee; gray for the reply brief; green for an amicus (if allowed, see Appellate Rule 17). The record appendix, if separately produced, should be covered in white. Motions may be either typewritten or xeroxed.

Reporters' Notes (1975) : The amendment to Appellate Rule 20(b) eliminates the requirement of "backing" the caption, so as to conform to the introduction of flat filing; see S.J.C. Rule 3:20.

Reporter's Notes (1979) : Subdivision (a) of Rule 20 was made applicable to criminal cases by former Appeals Court and Supreme Judicial Court Rules 1:14 (1975: 3 Mass. App. Ct. 803. 366 Mass. 860) and is unchanged.

Reporter's Notes (1991) : [Rule 20(a), first paragraph]

Experience has shown that volumes of appendices that are more than one and a half inches thick often fall apart and are clumsy to use. The limitation of each individual volume of the appendix to a thickness no greater than one and a half inches should solve the problem. If the appendix is larger in size, multiple volumes should be used.

Reporter's Notes (1991) : [Rule 20(a), final sentence, clause (5)]

These amendments [to Mass. R.A.P. 16(a)(7) and 20(a), final sentence, clause (5)] require individual counsel who are affiliated with a firm to include the firm name on filed briefs. Appellate judges need to know the firm names in order to determine correctly whether it is necessary to withdraw from a case.

Reporter's Notes (1999) : [Rule 20(a)]

I. Introduction.

Since the adoption of the Massachusetts Rules of Appellate Procedure in 1974, there have been only a few changes to Appellate Rule 20. With the advances in computer technology that have ensued since the 1970s, the Standing Advisory Committee on the Rules of Civil Procedure of the Supreme Judicial Court agreed with the recommendation of the clerks of the Supreme Judicial Court and of the Appeals Court that the time had come to re-examine Appellate Rule 20.

II. Briefs.

A number of changes to the existing rule were made in recognition of the fact that briefs today are typically computer-generated, whether an attorney produces a brief in-house or utilizes the services of a commercial firm. For example, outmoded references in the first paragraph of Rule 20(a) such as "standard typographic printing" and "printed matter" have been deleted. The reference to carbon copies has also been deleted.

The 1999 amendment also addresses a problem that has developed in recent years in the appellate courts of the Commonwealth. Judges have commented that in some instances briefs have been difficult to read because of the small size of letters. In addition, today's computer technology has provided opportunity for circumvention of the page limitations on briefs by compressing or condensing letters. If a brief is rejected by the clerk's office for such reasons, frustration and the additional expense of producing a replacement brief result. See "Strict Rule on Briefs Frustrates

Litigators," 26 Massachusetts Lawyers Weekly 55 (September 15, 1997). A new second paragraph has been added to Rule 20(a) to address these and other matters of form.

It should be noted the existing page limitations on briefs produced by computer word-processing — as contained in Appellate Rule 16(h) — remain the same.

The following provisions numbered (1) through (4) are applicable to all briefs under the amended rule:

(1) Margins. Top and bottom margins on a page shall be at least one inch; left and right margins must be at least one and one-half inches. The rule specifically allows a page number to be placed within a margin. Uniformity in margins will also facilitate the placing of text on both sides of a page of a document, a practice permitted by Rule 20(a)(4).

(2) Typeface. Only a monospaced font is allowed. Therefore, attorneys may no longer use a proportional font such as Times New Roman. The typeface must be a 12 point or larger size and a limitation of 10.5 characters per inch is imposed. It should be noted that these limitations are applicable to footnotes as well as text. These requirements should eliminate the problem brief where page limitations have been circumvented by means of reducing, compressing, or condensing typeface.

Right margin justification (the process by which the lettering on a line is spaced so that the last letter on each line is flush to the right margin) is not prohibited by this rule, as long as the right margin is at least one and one-half inches and the limitation of 10.5 characters per inch is observed.

(3) Line Spacing. Documents are to be double-spaced. Argument headings, footnotes, and indented quotations, however, may be single-spaced. The revised rule defines the terms double-spaced and single-spaced — terms which may have been obvious in the context of a brief produced by a typewriter — so that there will be no more than three lines per vertical inch for double spacing and no more than six lines per vertical inch for single spacing (with an overall limit of 27 double-spaced lines on a page).

(4) Text May Appear on Both Sides. The prior version of Rule 20(a) did not speak to the issue of text appearing on both sides of a page. In recent years, some attorneys have begun to submit briefs where the text appears on the front and back of a page. The 1999 amendment specifically allows this practice. Although it is not required that text must appear on both sides of a page, attorneys are encouraged to produce briefs in this fashion. It is hoped that the practice of putting text on the front and back of a page will significantly reduce the storage problems in the clerks' offices of the appellate courts by reducing the overall size of briefs.

Where counsel is unable to comply with the technical requirements of Rule 20, it would be advisable to move in the appellate court in advance for leave to file a non-conforming brief rather than risk rejection of the filing at a point where time deadlines may be about to expire.

III. Appendices.

The 1999 changes regarding briefs do not apply to the appendix. An appendix may contain existing documents, transcripts, and other matters that were not originally prepared by counsel. However, in an effort to help reduce the storage problems in the clerk's offices of the appellate courts, a sentence has been added to Appellate Rule 20(a) allowing the text of the appendix to be reproduced on both sides of a page, a practice that is also allowed (and in fact, encouraged) for briefs.

Reporter's Notes (1999) : [Rule 20(b)]

Appellate Rule 20(b), governing the form of papers other than briefs and appendices, has been amended to require that the cover of applications for direct appellate review (Rule 11) and for further appellate review (Rule 27.1) be white. This will allow the clerk's office more easily to identify such documents.

Reporter's Notes (2010) : Rule 20(a)(4) has been amended to require attorneys to include their e-mail addresses, if any, on the front cover of briefs and appendices. A similar amendment to Mass. R. Civ. P. 11(a) was adopted in 2010 requiring attorneys to include their e-mail addresses on pleadings.

Rule 21: Prehearing Conference

The appellate court may direct the attorneys for the parties to appear before the court or a single justice for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The appellate court or single justice shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered shall control the subsequent course of the proceeding, unless modified to prevent manifest injustice.

Reporters' Notes (1973) : Appellate Rule 21 allows the court to conduct a prehearing conference. Modeled on F.R.A.P. 33, it has no Massachusetts parallel at the appellate level.

Rule 22: Oral Argument

(a) Notice of Argument; Postponement. The clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed reasonably in advance of the date fixed for hearing.
(b) Time Allowed for Argument. Unless otherwise enlarged or limited by the appellate court, each side will be allowed 15 minutes for argument, except in a criminal case in which the defendant is appealing a conviction of murder in the first degree, in which case each side will be allowed twenty minutes for argument. If counsel is of the opinion that additional time is necessary for the adequate presentation of the argument, counsel may request additional time for good cause shown. Requests may be made by letter addressed to the clerk reasonably in advance of the date fixed for the argument. The appellate court may terminate the argument whenever in its judgment further argument is unnecessary.
(c) Order and Content of Argument. Except as otherwise provided in Rule 27.1(g), the appellant will argue first and shall include a fair statement of the case. Counsel will not be permitted to read, except briefly, from briefs, records, prepared statements, records or authorities. The party making the opening argument on request may be allowed the opportunity to reply in writing to new matter in the arguments of his adversary.
(d) Cross and Separate Appeals. A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the appellate court otherwise directs. If a case involves a cross appeal, the plaintiff in the action below shall be deemed the appellant for the purposes of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.
(e) Non-appearance of Parties. If the appellee fails to appear to present argument, the appellate court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if his counsel is present. If neither party appears, the case will be decided on the briefs unless the appellate court shall otherwise order.

(f) No Oral Argument by an Attorney Who Has Been a Witness Except by Leave of Court. No attorney shall be permitted to take part in the argument of a case in which he has been a witness for his client; except by special leave of court.

(g) Submission on Briefs. By agreement of the parties, a case may at any time be submitted for decision on the briefs, but the appellate court may direct that the case be argued. At any time, any party may, by written notice filed and served, waive his right to oral argument. No criminal case in which the defendant was convicted of murder in the first degree may be submitted for decision on the briefs without oral argument unless the full appellate court or a justice thereof shall have approved the submission prior to the week the case has been scheduled for argument.

(h) Use of Physical Exhibits at Argument; Removal. If physical exhibits other than documents or chalks are to be used at the argument, counsel shall arrange to have them placed in the court room before the court convenes on the date of the argument. After the argument, the exhibits shall be left with the clerk unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

Amended May 15, 1979, effective July 1, 1979, December 2, 1983, effective January 1, 1984; amended effective May 1, 1994; November 1, 1994; amended May 3, 2002, effective September 3, 2002.

Reporters' Notes (1973) : Appellate Rule 22 governs the conduct of oral argument. A modification of F.R.A.P. 34, it codifies prior practice. Enlargements of argument time beyond thirty minutes will rarely be allowed; compare F.R.A.P. 34(b). Rebuttal argument, a matter of right, Appellate Rule 22(c), is strictly limited to new matter raised in appellee's argument. Although failure explicitly to reserve rebuttal does not waive the right, failure to preserve for rebuttal purposes a portion of the thirty-minute argument time will effect a de facto waiver in the absence of leave granted.

Reporter's Notes (1979) : [Rule 22(g)]

The only change in Rule 22 is that the substance of Supreme Judicial Court Rule 1:20 (1975: 366 Mass. 862), relative to submission of capital cases on briefs, is added to subdivision (g) of the former rule. The provisions of Rule 22 were previously applicable to criminal appeals by virtue of Supreme Judicial Court Rule 1:20, supra, and Appeals Court Rule 1:20 (1975: 3 Mass. App. Ct. 804).

Reporter's Notes (1984) : Rule 22(b)

The purpose of this amendment is to conform Rule 22(b) to the actual practice in the appellate courts.

Reporter's Notes (1984) : Rule 22(c)

The purpose of this amendment is to conform Rule 22(c) to the actual practice in the appellate courts.

Reporter's Notes (1994) : [Rule 22(h)]

Mass. R.A.P. 22(h) does not give permission to counsel to refer to physical exhibits during oral argument. It only instructs counsel as to their obligation to arrange to have the physical exhibits in the court room before the court convenes if they are going to use them, and of the clerk's obligations afterwards.

Counsel should remember that it is their obligation to include in the appendix any portions of the record they are relying upon, including exhibits, in accordance with the provisions of Mass. R.A.P. 18(a) and 18(b). The third paragraph of Mass. R.A.P. 18(a) makes clear that ". . . the court may decline to permit the parties to refer to portions of the record omitted from the appendix, unless leave be granted prior to argument."

Physical exhibits cannot be actually placed in an appendix. Consequently, counsel on appeal who intend to refer to a physical exhibit, such as a revolver or a piece of clothing, should "prior to argument" seek leave of court to refer to such objects. Many appellate justices prefer to have pages in an appendix to refer to whenever possible. It is sound practice for counsel on appeal to have a photograph of physical exhibits appear on a page or pages of the appendix, even if prior permission has been given to use the actual physical exhibit at the oral argument.

Reporter's Notes Rule 22(b) (2002) : In 2002, the Supreme Judicial Court amended Appellate Rule 22(b) to reduce the time allowed for oral argument in first-degree murder cases from 30 minutes to 20 minutes for each side. The time for oral argument in all other cases remains 15 minutes for each side. As amended, Appellate Rule 22(b) further provides that if counsel desires additional time for oral argument, "counsel may request additional time for good cause shown." This latter provision replaces the former language that had provided that requests for additional time "will rarely be granted."

Rule 23: Issuance of Rescript: Stay of Rescript

The clerk of the appellate court shall mail to all parties a copy of the rescript and the opinion, if one was written. The rescript of the court shall issue to the lower court twenty-eight days after the date of the rescript unless the time is shortened or enlarged by order. The timely filing of a petition for rehearing or of an application for further appellate review will stay the rescript until disposition of the petition or application unless otherwise ordered by the appellate court. If the petition or application is denied, the rescript shall issue forthwith unless the appellate court or a single justice orders otherwise. If an application for further appellate review is granted the rescript of the Appeals Court shall not issue to the lower court.

Amended effective February 24, 1975.

Reporters' Notes (1973) : A rescript is the equivalent at the appellate level, of judgment in the trial court, Appellate Rule 1(c); Mass. R. Civ. P. 54(a). It is the appellate court's enunciation of its disposition of the appeal, the order directing the lower court's further conduct of the case. Usually, the rescript will issue to the lower court within fourteen days of its utterance by the appellate court. But a timely application for rehearing, Appellate Rule 27, or for further appellate review (if appropriate), Appellate Rule 27.1, will stay the issuance of the rescript.

Reporters' Notes (1975) : The amendment enlarges the period for the issuance of rescript from 14 days to 28 days. This change was required by the amendment to Appellate Rule 27.1(a), extending the period within which the party could apply for further appellate review from 10 days to 20 days. Without the amendment to Appellate Rule 23, therefore, a party properly waiting until the twentieth day to file his application for further appellate review might find that the rescript had issued six days earlier, thus cutting off his additional appellate rights. The other amendment to Appellate Rule 23 merely substitutes "petition" for "request" to conform with the language of Appellate Rule 27.

Reporter's Notes (1979) : The current text is unchanged but made applicable to criminal as well as civil cases.

Rule 24: Justices' Participation

(a) Other Justices May Participate Without Reargument. Whenever the justices before whom a law question has been heard so desire, others of the justices may be called in to take part in the decision, upon a perusal of the record and briefs, without reargument.

(b) Justice May Review Own Ruling in Certain Cases. No justice shall sit on the hearing of any proceeding in the nature of a review of any judgment decree, order, or ruling made by him; provided, however, that this shall not apply where it is necessary to secure a quorum or where the other justices of the court shall be equally divided in opinion.

Reporters' Notes (1973) : Appellate Rule 24(a) permits the participation in a decision of a justice who has not heard argument. Appellate Rule 24(b) regulates a justice's participation in review of his own ruling. The rule codifies prior practice, S.J.C. Rule 1:18, 1:19; Appeals Court Rule 1:18.

Reporter's Notes (1979) : Rule 24 is unchanged, but in criminal cases supersedes former Appeals Court and Supreme Judicial Court Rules 1:18 (1972: 1 Mass. App. Ct. 892, amended, 1975: 3 Mass. App. Ct. 801. 1967: 351 Mass. 731, amended, 1975: 366 Mass. 853) and 1:19 (1975: 3 Mass. App. Ct. 804. 1967: 351 Mass. 741-42, amended, 1975: 366 Mass. 853).

Rule 24.1: Divided Vote on Further Appellate Review

If, following allowance of an application for further appellate review, the justices of the Supreme Judicial Court are equally divided in opinion, unless a majority of the participating justices decides otherwise, the court shall issue an order noting such equal division, the effect of which shall be the same as if the court had denied the application for further appellate renew.

Adopted effective January 1, 1994.

Rule 25: Damages for Delay

(Applicable to Civil Cases)

If the appellate court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee, and such interest on the amount of the judgment as may be allowed by law.

Amended December 22, 1978, effective January 15, 1979; May 15, 1979, effective July 1, 1979.

Reporters' Notes (1973) : Appellate Rule 25, taken from F.R.A.P. 38, allows the court to award damages and appropriate costs if it determines that an appeal was taken frivolously. See Oscar Gruss & Son v. Lumberman's Mutual Casualty Co., 422 F.2d 1278, 1283-1284 (2d Cir. 1970). This is new to Massachusetts practice.

Reporter's Notes (1979) : Rule 25 is limited to civil cases.

Rule 26: Costs

(Applicable to Civil Cases)

(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the appellate court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed on reversed in part, or is vacated, costs shall be allowed only as ordered by the appellate court.

(b) Costs For and Against the Commonwealth. In cases involving the Commonwealth or an agency or officer thereof, if an award of costs against the Commonwealth is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the Commonwealth.
(c) Costs of Briefs, Appendices, and Copies of Records. The cost of printing or otherwise producing necessary copies of briefs, appendices, or copies of records authorized by Rule 18(f) shall be taxable in the lower court at rates not higher than those generally charged for such work in the Commonwealth. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk of the lower court, with proof of service, within fourteen days after the entry of judgment.
(d) Clerk to Insert Costs in Lower Court Judgment; Costs Taxable. The clerk of the lower court shall prepare and certify an itemized statement of costs for insertion in the lower court judgment. The statement shall include those costs taxable under subdivision (c) of this rule; costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of any bond to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the lower court as costs of the appeal in favor of the party entitled to costs under this rule.
Amended May 15, 1979, effective July 1, 1979.

Reporters' Notes (1973) : Appellate Rule 26, based on F.R.A.P. 39, governs the allowance of costs, and follows prior practice. See G.L. c. 261, § 22. Costs are taxable against the Commonwealth as against an individual. G.L. c. 261, §§ 14, 16. Appellate Rule 26(c), dealing with costs of briefs, enlarges existing practice somewhat, see former G.L. c. 261, § 25; previously a prevailing party could recover only $50 of the cost of printing his brief, unless the court allowed a larger discretionary sum; under Appellate Rule 26(c) the prevailing party recovers the necessary costs of producing the briefs at a rate not higher than such costs generally charged in the Commonwealth.

Reporter's Notes (1979) : Rule 26 is limited to civil cases.

Rule 27: Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing should be filed with the clerk of the appellate court within fourteen days after the date of the rescript unless the time is shortened or enlarged by order. It shall state with particularity the points of law or fact which it is contended the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted, except by order of the quorum or panel which decided the appeal. No answer to a petition for rehearing will be received unless requested by the quorum or panel, but a petition for rehearing will ordinarily not be granted in the absence of such a request. A petition for rehearing shall be decided by the quorum or panel which decided the appeal. If a petition for rehearing is granted, the quorum or panel may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case. Action upon a petition is in the discretion of such quorum or panel, which may award costs, including a reasonable attorney's fee, to the prevailing party.
(b) Form of Petition; Length. The petition shall be in a form of a letter to the senior justice of the quorum or panel which decided the appeal with seven clear and legible copies, and additional copies shall be mailed by first class mail

or delivered to all other counsel. Except by permission of the quorum or panel, a petition for rehearing shall not exceed ten pages of standard typewritten material.

(c) Revision of Decision. Upon consideration of a petition for rehearing, a quorum or panel may in writing order their decision to be reviewed and revised by a majority of the justices of the court. The petitioner shall notify the Supreme Judicial Court of any action taken on the petition if an application for further appellate review also has been filed.

Amended June 7, 1985, effective July 1, 1985; January 28, 1986, effective February 1, 1986; amended effective July 1, 1991.

Reporters' Notes (1973) : Appellate Rule 27, taken from F.R.A.P. 40, governs petitions for rehearing. It will not change prior practice, under which a petition for rehearing was addressed to the discretion of the court, Merrill v. Beckwith, 168 Mass. 72, 75, 46 N.E. 400, 401 (1897), and ordinarily could not be supported by oral argument, Wall v. Old Colony Trust Company, 177 Mass. 275, 278, 58 N.E. 1015, 1016 (1901).

Reporter's Notes (1985) : [Rule 27(a)]

The change from ten days to fourteen days after the date of the rescript for a petition for rehearing conforms the time period to that found in Fed. R.A.P. 40(a). Such conformity of time periods may aid practitioners.

Reporter's Notes (1986) : [Rule 27(a), (b), and (c)]

This amendment provides for review of petitions for rehearing by the quorum or panel which decided the appeal. The purpose of the amendment is to conform Rule 27 to the actual practice in the appellate courts.

Reporter's Notes (1991) : [Rule 27(c)]

The purpose of these amendments [to Mass. R.A.P. 27(c) and 27.1(b)] is to provide the Supreme Judicial Court with notice of the pendency of and action taken on a petition for rehearing in the Appeals Court when an application for further appellate review has also been filed in the case. On occasion, the Supreme Judicial Court has allowed an application for further appellate review in a case in which the Appeals Court, without the Supreme Judicial Court's knowledge, had already granted a petition for rehearing. Under the amendments, if any party applies for further appellate review by the full Supreme Judicial Court: i) the petitioner shall notify the Supreme Judicial Court of any action taken on the petition for rehearing (Mass. R.A.P. 27(c)); and ii) the application for leave to obtain further appellate review shall contain, inter alia, "whether any party is seeking a rehearing in the Appeals Court" (Mass. R.A.P. 27.1(b)(2)).

Rule 27.1: Further Appellate Review

(a) Application; When Filed; Grounds. Within twenty days after the date of the rescript of the Appeals Court any party to the appeal may file an application for leave to obtain further appellate review of the case by the full Supreme Judicial Court. Such application shall be founded upon substantial reasons affecting the public interest or the interests of justice. Oral argument in support of an application shall not be permitted except by order of the court.

(b) Contents of Application; Form. The application for leave to obtain further appellate review shall contain, in the following order: (1) a request for leave to obtain further appellate review; (2) a statement of prior proceedings in the case (including whether any party is seeking a rehearing in the Appeals Court); (3) a short statement of facts relevant to the appeal (but facts correctly stated in the opinion, if any, of the Appeals Court shall not be restated); (4) a statement of the points with respect to which further appellate review of the decision of the appeals court is sought; and (5) a brief statement (covering not more than ten pages of typing), including appropriate authorities, indicating

why further appellate review is appropriate. A copy of the rescript and opinion, if any, of the Appeals Court shall be appended to the application. In addition, if the Appeals Court entered a memorandum and order under Appeals Court Rule 1:28 which refers to another document, such as a brief or judge's findings and rulings, a copy of that document, or, if appropriate, the pertinent pages of that document, shall be appended to the application. The application shall comply with the requirements of Rule 20.

(c) Opposition; Form. Within ten days after the filing of the application, any other party to the appeal may, but need not, file and serve an opposition thereto (covering not more than ten pages of typing) setting forth reasons why the application should not be granted. The opposition shall not restate matters described in subdivision (b)(2) and (3) of this rule unless the opposing party is dissatisfied with the statement thereof contained in the application. An application shall comply with the requirements of Rule 20.

(d) Filing; Service. One copy of the application and one copy of each opposition shall be filed in the office of the clerk of the Appeals Court. An original and seventeen copies of the application and of each opposition shall be filed in the office of the clerk of the full Supreme Judicial Court. Filing and service of the application and of any opposition shall comply with Rule 13.

(e) Vote for Further Appellate Review; Certification. If any three justices of the Supreme Judicial Court shall vote for further appellate review for substantial reasons affecting the public interest or the interests of justice, or if a majority of the justices of the Appeals Court or a majority of the justices of the Appeals Court deciding the case shall certify that the public interest or the interests of justice make desirable a further appellate review, an order allowing the application or the certificate, as the case may be, shall be transmitted to the clerk of the Appeals Court; upon receipt, further appellate review shall be deemed granted. The clerk shall forthwith transmit to the clerk of the full Supreme Judicial Court all papers theretofore filed in the case and shall notify the clerk of the lower court that leave to obtain further appellate review has been granted.

(f) Briefs. Any party may apply to the Supreme Judicial Court within ten days after the date on which the appeal is docketed in the full Supreme Judicial Court for permission to file a new brief. If the application is granted, the new brief must be filed in accordance with the briefing schedule established by the Clerk of the Supreme Judicial Court, and the court may impose terms as to the length and filing of such brief and any response thereto. If a new brief is filed, it will be considered in lieu of the Appeals Court brief. If permission to file a new brief is denied or not sought, cases in which further appellate review has been granted shall be argued on the briefs filed in the Appeals Court.

(g) Order of Argument. The applicant for leave to obtain further appellate review will argue first unless the court directs or the parties agree otherwise.

Amended effective February 24, 1975; July 1, 1991; January 1, 1994; November 1, 1994; February 1, 1995; April 14, 1995; amended October 30, 1997, effective January 1, 1998, Amended, effective June 1, 2001; amended February 26, 2004, effective April 1, 2004.

Reporters' Notes (1973) : G.L. c. 211A, § 11 permits the Supreme Judicial Court, for substantial reasons of justice or the public interest, to review cases determined in the Appeals Court, provided three justices of the Supreme Judicial Court so order, or a majority of the Appeals Court or a majority of the Appeals Court panel deciding the case certify the desirability of further review. Appellate Rule 27.1 regulates the application for such review.

Further review is analogous to the granting of certiorari by the Supreme Court of the United States. Applications for such review will not ordinarily entail oral argument; and if granted, review will usually be argued on the briefs and record appendix filed in the Appeals Court.

Reporters' Notes (1975) : As originally promulgated, a party desiring further appellate review had 10 days from the date of rescript to file an appropriate application. Because, in practice, this period did not suffice, it has been enlarged to 20 days. In addition, an amendment to Appellate Rule 27.1(f) allows a party who so desires to apply to the Supreme Judicial Court for leave to file a brief different from or supplementary to his brief in the Appeals Court. As originally promulgated, Rule 27.1(f) did not make clear that the party had a right to lodge such a request. However, absent leave of court, whether because the court denies the application or because the party fails to file it initially, the case will be argued on the Appeals Court papers.

Reporter's Notes (1979) : Appellate Rule 27.1 was previously applicable to further appellate review in criminal cases by virtue of Supreme Judicial Court Rule 3:24, § 7 (1975: 366 Mass. 874), except that the words "record appendix" (prepared by the appellant) were taken to mean "record" (assembled by the clerk, former G.L. c. 278, § 33C [St.1974, c. 458, § 1]). That distinction is no longer viable (see Rule 18[a]).

In criminal cases, § 7 of Supreme Judicial Court Rule 3:24 imposes two requirements additional to those of Appellate Rule 27.1. Subdivision 27.1(d) calls for copies of an application for further appellate review and any opposition to be filed with the clerks of the Appeals and Supreme Judicial Courts; Rule 3:24, § 7 further mandates that a copy of the application is to be served on the clerk of the trial court the action of which is on appeal. Subdivision 27.1(e) provides for notice to the clerk of the lower court by the clerk of the Appeals Court when an application for further appellate review is granted; Rule 3:24, § 7 further requires such notice in criminal cases if an application is denied.

Reporter's Notes (1991) : [Rule 27.1(b)]

The purpose of these amendments [to Mass. R.A.P. 27(c) and 27.1(b)] is to provide the Supreme Judicial Court with notice of the pendency of and action taken on a petition for rehearing in the Appeals Court when an application for further appellate review has also been filed in the case. On occasion, the Supreme Judicial Court has allowed an application for further appellate review in a case in which the Appeals Court, without the Supreme Judicial Court's knowledge, had already granted a petition for rehearing. Under the amendments, if any party applies for further appellate review by the full Supreme Judicial Court: i) the petitioner shall notify the Supreme Judicial Court of any action taken on the petition for rehearing (Mass. R.A.P. 27(c)); and ii) the application for leave to obtain further appellate review shall contain, inter alia, "whether any party is seeking a rehearing in the Appeals Court" (Mass. R.A.P. 27.1(b)(2)).

Reporter's Note (1994) : [Rule 27.1(g)]

In those cases in which the Appeals Court has reversed or vacated the judgment in the Trial Court and the Supreme Judicial Court has allowed further appellate review, Rule 27.1(g) places the applicant for further appellate review in the position of appellant for the purpose of order of argument. See Rule 22(c). The court by order or the parties by agreement may change the order of argument. In a case in which both parties apply for further appellate review, order of argument will be controlled by such agreement of the parties or order of the court.

Reporter's Note (1995) : [Rule 27.1(e)]

The 1995 amendment to appellate Rule 27.1(e) makes the rule consistent with the practice of the Supreme Judicial Court which is to vote for further appellate review but not to sign an order concerning such vote.

Reporter's Notes (1997) : [Rule 27.1 (d), effective January 1, 1998]

The 1997 amendment to Appellate Rule 27.1(d) increased to seventeen the number of copies of an application for further appellate review and of each opposition to be filed in the clerk's office of the Supreme Judicial Court. The amendment also clarified that an original is to be filed together with the seventeen copies.

Reporter's Notes (1999) : The cover of applications for further appellate review shall be white. See Appellate Rule 20(b), as amended in 1999.

Reporter's Notes (2001) : [Rule 27.1(f)]

Where further appellate review has been granted after consideration of a case by the Appeals Court, the case will be reviewed in the Supreme Judicial Court based on the brief that was earlier filed in the Appeals Court. Prior to the 2001 amendment, Appellate Rule 27.1(f) provided that a party may request permission to file a separate or supplemental brief in the Supreme Judicial Court within ten days of the order granting further appellate review. However, time periods regarding service and filing of briefs in the appellate courts are generally measured from the date the appeal is docketed in the appellate court. See, for example, Appellate Rule 11(g).

To maintain consistency, therefore, the clerk's office of the Supreme Judicial Court requested that Appellate Rule 27.1(f) be amended. The amended rule provides that the time period to request permission to file a separate or supplemental brief on further appellate review runs from the date the appeal is docketed in the Supreme Judicial Court.

Reporter's Notes (2004) : [Rule 27.1(f)]

The 2004 amendment to Appellate Rule 27.1(f) revises the practice of requesting permission to file a separate or supplemental brief in cases where further appellate review in the Supreme Judicial Court has been granted. The parties have the option to rely upon the Appeals Court brief or to request permission (within ten days after the appeal is docketed in the Supreme Judicial Court) to file a new brief in lieu of the Appeals Court brief. Thus, under the revised procedure, only one brief from each party will be considered by the Supreme Judicial Court. No party may file both the brief from the Appeals Court and a new brief.

Rule 28: Entry of Judgment Following Rescript

(Applicable to Civil Cases)

When the rescript from the appellate court sets forth the text of the judgment to be entered, the clerk of the lower court shall, upon receipt of the rescript, prepare, sign and enter the judgment which has been ordered. If the rescript orders settlement of the form of the judgment in the lower court, the clerk of the lower court shall sign and enter the judgment after settlement. Notation of a judgment in the lower court docket constitutes entry of the judgment.

Amended May 15, 1979, effective July 1, 1979.

Reporters' Notes (1973) : Appellate Rule 28 prescribes the duties of the lower court clerk upon receipt of the appellate court rescript. It should always be remembered that it is the judgment of the lower court, not the rescript (however much the terms of the rescript may shape the final judgment), which regulates the nature and quantum of any relief obtained. Until that judgment has been made to conform to the rescript, the litigation is not terminated. The rescript may dictate the text of the judgment or it may enjoin the parties to "settle," i.e., jointly work out a draft of a judgment to be approved by the appellate court before transmission to the lower court clerk for entry.

Reporter's Notes (1979) : Rule 28 is limited in applicability to civil cases. The existing practice in criminal cases, to be continued under the Rules, is to enter the rescript on the docket rather than to prepare a separate "judgment" as is done in civil cases.

Rule 29: Voluntary Dismissal

(a) Dismissal in the Lower Court. If an appeal has not been docketed, the appeal may be dismissed by the lower court upon the filing in that court of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant.

(b) Dismissal in the Appellate Court. If the parties to an appeal or other proceeding shall sign and file with the clerk of the appellate court an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case as dismissed, but no rescript or other process shall issue without an order of the appellate court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court. The clerk of the appellate court shall promptly notify the clerk of the lower court whenever an appeal in a criminal case is dismissed pursuant to this rule.

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

Amended May 15, 1979, effective July 1, 1979.

Reporters' Notes (1973) : Appellate Rule 29, based on F.R.A.P. 42, is a housekeeping measure regulating voluntary dismissal of appeals and the settlement of cases. Appellate Rule 29(c) is designed to ensure that the court is kept informed of any out-of-court disposition.

Reporter's Notes (1979) : [Rule 29(b)]

Rule 29 is changed only in that paragraph (b) of Rule 29, governing dismissal of an appeal in the appellate court, now provides for notification of the clerk of the lower court by the clerk of the appellate court whenever an appeal in a criminal case is dismissed in the appellate court.

Rule 30: Commencement of Action

(Applicable to Civil Cases)

(a) Death of a Party. If a party dies after a notice of appeal is filed in the lower court or while a proceeding is pending in the appellate court, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the appropriate court. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 13. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the appellate court or a single justice may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the lower court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the appeal is docketed, substitution shall be effected in the appellate court in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by his personal representative, or, if he has no personal representative, by his attorney of record within the time prescribed by these rules. After the appeal is docketed, substitution shall be effected in the appellate court in accordance with this subdivision.

(b) Substitution for Other Causes. If substitution of a party in the appellate court is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) Public Officers; Death or Separation From Office.

(1) When a public officer is a party to an appeal or other proceeding in an appellate court in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.
(2) When a public officer is a party to an appeal or other proceeding in his official capacity he may be described as a party by his official title rather than by name; but the court may require his name to be added.
Amended May 15, 1979, effective July 1, 1979.

Reporters' Notes (1973) : Appellate Rule 30 governs the substitution of a party, whether because of death or for some other cause, and also regulates the substitution of public officers. It is based on F.R.A.P. 43; see also Mass. R. Civ. P. 25.

Rule 31: Duties of Clerks

(a) General Provisions. Any clerk of the appellate court shall take the oath and give the bond required by law. No clerk shall practice in any court as an attorney or as counselor while he continues in office. The Supreme Judicial Court and the Appeals Court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The office of the clerk with a clerk in attendance shall be open during the hours from nine in the morning to four-thirty in the afternoon on all days except Saturdays, Sundays, and those days specified in G.L. c. 4, § 7, any other day appointed as a holiday by the President or the Congress of the United States, or designated by the laws of the Commonwealth, and except that either court may authorize closing of its clerk's office at four in the afternoon during the period between the Fourth of July and Labor Day.
(b) The Docket; Calendar; Other Records Required. The clerk shall keep a book known as the docket, in such form and style as may be prescribed by the appellate court, and shall enter therein each case. Cases shall be assigned consecutive file numbers. The file number of each case shall be noted on the folio of the docket whereon the first entry is made. All papers filed with the clerk and all process, orders and rescripts shall be entered chronologically in the docket on the folio assigned to the case. Entries shall be brief but shall show the nature of each paper filed or rescript or order entered. The entry of an order or rescript shall show the date the entry is made. The clerk shall keep a suitable index of cases contained in the docket. The clerk shall prepare, under the direction of the appellate court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, he shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law. The clerk shall keep such other books and records as may be required from time to time by law or by the appellate court.
(c) Notice of Orders or Rescripts. Immediately upon the entry of an order or rescript or upon receipt of notice of the grant of an application for direct or further appellate review the clerk shall serve a notice of entry by mail upon each party to the proceeding together with a copy of any opinion respecting the order or rescript, and shall make a note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.
(d) Custody of Records and Papers. The clerk shall have custody of the records and papers of the appellate court. He shall not permit any original record or paper to be taken from his custody except as authorized by the orders or

instructions of the court or a single justice. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the lower court from which they were received.

Reporter's Notes (1973) : Appellate Rule 31, based on F.R.A.P. 45, outlines the duties and responsibilities of the clerk and his assistants. Note that although the clerk's office is open only during normal business hours, the court is deemed open at all times for purposes of filing motions, papers, and the like. See also Mass. R. Civ. P. 77.

Reporter's Notes (1979) : The duties of clerks set out in this Rule have been applicable to criminal appellate procedure since the effective dates of Appeals Court Rule 1:27 (February 27, 1975: 3 Mass. App. Ct. 805) and Supreme Judicial Court Rule 1:27 (January 1, 1975: 366 Mass. 862).

Reporter's Note (1984) : Under the provisions of Mass. R. A. P. 31 (d), transcripts filed in the appellate court need not be returned to the lower court. For this purpose, transcripts are not part of the "original papers." See Mass. R. A. P. 8 (a), which lists "original papers" as distinct from "the transcript of proceedings."

Rule 32: Title

These rules may be known and cited as the Massachusetts Rules of Appellate Procedure.

Reporters' Notes (1973) : The formal title of the Appellate Rules is "Massachusetts Rules of Appellate Procedure." They may be cited "Mass.R.A.P."