

SUPREME JUDICIAL COURT

Boston, Massachusetts 02108

NOTICE OF APPROVAL

Notice is hereby given that the Supreme Judicial Court has approved and promulgated rules as further indicated below.

RALPH D. GANTS
Chief Justice

1. Court Submitting Rules for Approval:

Superior Court

2. Date Rules Submitted for Approval:

May 16, 2017

3. Date Approved & Promulgated by the Supreme Judicial Court:

November 7, 2017

4. Rule or Rules, or Amendments Thereto, Approved and Promulgated:

New Superior Court Rule 73, as attached hereto.

5. Effective Date:

January 1, 2018

(The original of this notice is to be filed in the office of the Clerk of the Supreme Judicial Court for the Commonwealth, and a copy to be sent by the Clerk to the court which requested approval of the rules.)



COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT
THREE PEMBERTON SQUARE
BOSTON, MA 02108

JUDITH FABRICANT
CHIEF JUSTICE

TELEPHONE
617-788-7301

October 23, 2017

Hon. Frank M. Gaziano
Chair of the Rules Committee
Supreme Judicial Court
John Adams Courthouse, Suite 2200
One Pemberton Square
Boston, MA 02108

RE: Request for Change to Superior Court Rules

Dear Justice Gaziano:

By letter dated May 16, 2017, the Superior Court requested that the Supreme Judicial Court approve changes to Superior Court Rule 9A (Civil Motions) and 9D (Motions for Reconsideration), and adoption of proposed new Rules 6 (Jury Selection) and 73 (Medical Malpractice Cases). Thereafter, by letter dated July 17, 2017, the Superior Court requested approval of the proposed changes to Rules 9A, 9D, and Rule 6. The SJC issued an order of approval of those changes, making them effective September 1, 2017.

I am informed that the SJC has now approved the Superior Court's proposed Rule 73, in the form attached hereto. Accordingly, I request that the SJC issue an order making the new rule effective January 1, 2018.

As explained in the Superior Court's original letter dated May 16, 2017, the impetus for a new Superior Court rule to manage medical malpractice cases began with the Court's recognition that current practice deviates significantly from the statutory mandate, and fails to achieve timely resolution of these cases. General Laws c. 231, § 60B, directs that the Court convene a three-member tribunal within 15 days after each defendant files an answer, with the medical member to be appointed "from a list submitted by the Massachusetts Medical Society" (MMS), consisting of physicians practicing in the defendant's field, and outside of the defendant's county. Such a list can be compiled only on a case-specific basis. MMS does not and never has compiled case-specific lists. It does post a general list on its website, but that list has not been sufficiently

broad and up-to-date to enable the clerks in the various counties, despite their strenuous efforts, to identify physicians who meet the statutory requirements and are willing and able to serve within a time-frame even reasonably close to the statutory deadline. As a result, the time from answer to tribunal is routinely as much as a year, and sometimes more. Delays in tribunals, in turn, delay discovery and trial, and deprive the parties of the early screening function that the tribunal was intended to serve. In addition, when these cases are called for final pretrial conference – the usual time for setting a trial date in civil cases – often we learn that trial counsel are unavailable for more than a year, sometimes as much as two, because of their busy trial schedules.

In an effort to begin a process of identifying solutions, in April of 2016 I invited some forty attorneys, insurance representatives, judges, and clerks to meet to discuss these longstanding and widely recognized challenges. Thirty-two people attended the meeting, held on June 17, 2016, and participated in a vigorous discussion. I then appointed a working group, consisting of five judges (including ones who had had substantial pre-judicial experience on both sides of these cases), a clerk and an assistant clerk, four attorneys (representing both sides), a representative of a medical malpractice insurer, and the assistant general counsel to the MMS. The working group met and circulated multiple drafts of a proposed rule, reaching consensus on many but not all issues. A draft was then circulated to the original group of 32, which responded with additional ideas, generating further discussion among the members of the working group. Again the group achieved substantial but not complete agreement.

I then appointed an Ad Hoc Committee on Medical Malpractice Cases, consisting of the five judicial members of the working group, to synthesize the various ideas and proposals, and prepare a draft proposed rule for consideration by the justices of the Superior Court at our semi-annual business meeting on December 2, 2016. The group's efforts culminated in a draft proposed Superior Court Rule 73. At the December 2, 2016, business meeting, the justices voted to approve publication of the proposed rule for comment. Publication occurred on December 7, 2016, with posting of the proposal on the Superior Court's website, and notice was sent to Massachusetts Lawyers Weekly on the same day. The Court set a deadline for submitting comments of February 15, 2017, but received and accepted comments through February 24, 2017. We received comments from individual attorneys and groups of attorneys who represent plaintiffs and defendants, as well as from insurers and the MMS. The Ad Hoc Committee gave careful consideration to the comments, and made significant revisions to the proposed rule. The justices of the Superior Court discussed the revised version at our semi-annual business meeting on April 29, 2017, and voted to submit the proposed rule to the SJC for approval. Thereafter, we added clarifying language at the suggestion of the SJC Rules Committee after its initial review.

The proposed rule provides, in summary, as follows: Within 15 days after each defendant files an answer, the plaintiff must file and serve an offer of proof. Failure to do so may result in the judge issuing an adverse finding, with the same effect that an adverse finding by a tribunal would have. Within 30 days after filing an answer, and after having reviewed any offer of proof received, a defendant who seeks a tribunal must file a demand; failure to do so constitutes a waiver of the tribunal, with the same effect that a finding by a tribunal in favor of the plaintiff would have. If an offer of proof has been filed, the defendant's demand must specify each respect, if any, in which the defendant claims that the offer of proof fails to raise a legitimate question of liability appropriate for judicial inquiry. In the case of a licensed physician, the defendant must send a copy of the demand to the MMS; must include the information necessary for the MMS to meet its statutory obligation to provide a case-specific list of physicians who would meet the statutory requirements to serve on the tribunal; and must notify the MMS of its obligation to provide such a list in a timely manner, with 30 days to be deemed timely. The clerk will then schedule the tribunal as soon as practicable upon receipt of a case-specific list from the MMS. If the MMS (or other licensing agency if defendant is a non-physician licensed provider) does not provide a list within 90 days, the clerk shall schedule a hearing before a judge alone. The judge may then determine whether the offer of proof, if properly substantiated, is sufficient to raise a legitimate question of liability appropriate for judicial inquiry. That determination will be without prejudice to reconsideration by a full tribunal if the clerk later receives a case-specific list of providers, upon motion by any party, unless such reconsideration would unduly delay trial.

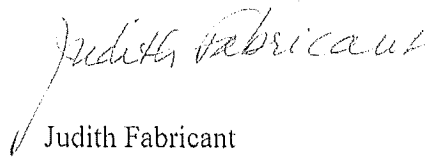
The proposed rule further provides that no case is to be stayed automatically pending a tribunal, but a judge may order a stay, on motion, if the judge determines that the demand identifies a serious deficiency in the offer of proof and the plaintiff does not post a bond. The proposed rule also provides that all medical malpractice cases will be scheduled for a trial assignment conference not later than 18 months after filing of the complaint, at which the court will, in consultation with counsel, set dates for expert disclosures, final pretrial conference, and trial.

It is the view of the Superior Court that proposed Rule 73 would bring the management of medical malpractice cases into closer conformance with the statutory mandate, and would make substantial progress toward timely resolution of these cases. We expect that prompt filing and service of the offer of proof will provide to defendants the discovery that is often the primary benefit of the tribunal. That, along with the requirement that a demand identify the claimed deficiency in the offer of proof, will likely lead many defendants to refrain from making a demand where no genuine deficiency exists that a tribunal could properly address under the applicable standard. Thus, we expect that the rule will eliminate or reduce the number of unproductive tribunals, saving time and resources for the parties, the medical community, and the Court, and eliminating unnecessary delay. Further, we expect that, where tribunals do occur, the rule will implement the statutory directive that the MMS, not the clerk, bear the burden of

identifying physicians who meet the statutory requirements and are willing and able to serve in a timely manner. We further expect that the provision for trial assignment conferences at 18 months will facilitate our efforts to achieve firm, timely trial dates, to the benefit of all parties and the Court.

The Superior Court requests that the SJC order that this rule change become **effective January 1, 2018**. The proposed rule as approved by the SJC accompanies this letter. Thank you for your consideration.

Very truly yours,



Judith Fabricant

cc: Chief Justice Paula M. Carey
Hon. Douglas H. Wilkins, Chair, Superior Court Rules Committee and
Ad Hoc Committee on Medical Malpractice Cases
Christine Burak, Esq., Secretary of the Rules Committee

PROPOSED NEW SUPERIOR COURT RULE 73

Rule 73. Medical Malpractice Cases (Applicable to All Counties)

(applicable to all cases subject to G. L. c. 231, § 60B (medical malpractice))

1. *Offer of Proof; Failure to File.*
 - a. Within 15 days after each defendant's answer has been filed in a case subject to G.L. c. 231, § 60B, the plaintiff(s) shall file the offer of proof with the clerk and provide a copy to the defendant(s). The parties may agree to a different deadline, in a written stipulation filed with the court. For purposes of cases referred for a tribunal from other trial court departments, or the federal courts, the date of docketing of the referral in the Superior Court shall be substituted for the date of filing of the answer.
 - b. Upon a plaintiff's failure to file a timely offer of proof, the court may find, upon motion of a party or its own initiative, that the plaintiff has failed to present sufficient evidence to raise a legitimate question of liability appropriate for judicial inquiry as to the defendant who filed the answer. A plaintiff's failure to file a timely offer of proof shall waive the plaintiff's right to a tribunal before entry of such a finding by the court.
 - c. By motion, or on its own initiative, the court may schedule a prompt conference, in addition to, or in lieu of the procedures set forth in parts 2-6, below.
2. *Demand for Tribunal; Notice to Massachusetts Medical Society; Duties of Party Demanding a Tribunal.*
 - a. Any party who demands a tribunal under § 60B ("Filing Party") shall file a document entitled "Demand for Tribunal" within 30 days of the filing of the answer, after reviewing the offer of proof, if any. The Demand for Tribunal shall specify each respect, if any, in which the Filing Party claims that the offer of proof fails to raise a legitimate question of liability appropriate for judicial inquiry.
 - b. Any defendant's failure to file a timely Demand for Tribunal shall waive that defendant's right to a tribunal.
 - c. If the defendant is a licensed physician or a medical institution or facility:
 - i. The Demand for Tribunal shall (A) specify the field of medicine in which the alleged injury occurred and (B) list each county where the defendant practices and each county where the defendant resides, or if the defendant is a medical institution or facility, shall list the county where the institution or facility is located. The Filing Party shall consult with all

other parties, and if there is disagreement about the field of medicine or county, shall include all fields and counties identified by any party.

ii. The Filing Party shall, simultaneously with filing, serve the Demand for Tribunal on all parties of record or their counsel and the Massachusetts Medical Society ("Society"). Any Demand for Tribunal sent to the Society shall state prominently that:

1. A medical malpractice tribunal will occur if the Society timely submits a case-specific list consisting of the name(s) of physicians representing the field of medicine in which the alleged injury occurred and licensed to practice medicine and surgery in the commonwealth under the provisions of section two of chapter one hundred and twelve; and that the list shall consist only of physicians who practice medicine outside the county where the defendant practices or resides or if the defendant is a medical institution or facility outside the county where said institution or facility is located; and
2. The Court considers a submission timely if the Society provides the information to the clerk, with copies to all parties or their counsel, within 30 days of receiving the Demand for Tribunal.

- d. If the defendant is not a licensed physician, the Filing Party shall obtain a case-specific list from the pertinent licensing agency and provide it to the clerk within 90 days after the answer is filed, with advance notice to other parties, who may participate if they choose.
- e. For purposes of this rule, a "case-specific list" means: (1) if the defendant is a physician, a list of physicians who meet the criteria appearing in par. 2.ii.1 or (2) if the defendant is not a physician, a list consisting of the name(s) of representatives of the field of medicine in which the alleged injury occurred who are licensed to practice in that field under the laws of the Commonwealth; provided that the list shall consist only of such representatives who practice outside the county where the defendant practices or resides.

3. *Tribunal.*

The clerk shall schedule the tribunal as soon as practicable upon receipt from the Society (or the Filing Party under paragraph 2(d)) of the information required paragraph 2(c) or 2(d). The clerk shall send notice of the date and time of the tribunal hearing to all parties or their counsel, listing the panel members' names and contact information. The plaintiff shall send a copy of the offer of proof to each panel member at least 5 days before the tribunal hearing.

Until the clerk receives a case-specific list of eligible and available physicians or medical providers, the clerk has no statutory responsibility to schedule a tribunal, but may, in the exercise

of discretion, choose to devote available resources in a timely manner to identify an eligible physician or medical provider member of the tribunal.

4. *Delay in Providing The Case-Specific List of Physicians or Medical Providers to the Clerk*

If the clerk does not receive a case-specific list of providers within 90 days after the answer is filed, the clerk shall schedule a hearing before a single judge to determine whether the offer of proof, if properly substantiated, is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result. Such determination shall be without prejudice to reconsideration by a full tribunal, consisting of medical member, attorney, and judge, as provided in part (2) of the next sentence hereof. If the clerk later receives a case-specific list of providers, then: (1) if the hearing has not already occurred, it shall occur before a full tribunal; (2) if the hearing has already occurred, and if any party files a motion for reconsideration by a full tribunal, the court shall allow such motion unless it determines that allowing the motion would unduly delay the trial.

5. *Voluntary Waiver of Tribunal.*

Any party may waive a right to a § 60B tribunal consisting of three members, without thereby waiving any other rights or arguments in the case. If the plaintiff waives the tribunal, the court shall require posting of a bond in the statutory amount, without prejudice to the right of either party to move to increase or reduce the amount of the bond. If the defendant waives the tribunal, the court may allow the plaintiff(s) to proceed without a bond and need not schedule any further § 60B Hearing with respect to that defendant. Upon waiver of the tribunal, the clerk shall send an informational copy of the complaint and offer of proof to the Board of Registration in Medicine with a clear disclaimer that no tribunal occurred under § 60B because the defendant waived the tribunal but reserved all rights to challenge the claims in the offer of proof at trial.

6. *Stay.*

- a. No medical malpractice lawsuit is automatically stayed pending a tribunal decision, but a session judge may enter a stay, upon motion in compliance with Superior Court Rule 9A, if the Demand for Tribunal identifies a serious issue with the offer of proof and the plaintiff does not post a bond.
- b. Notwithstanding subparagraph a, in the absence of a court order, no defendant is required, over objection, to take any action if the plaintiff does not timely post a bond (i) after failing to file a timely offer of proof or (ii) after a tribunal finding adverse to the plaintiff as to that defendant.

7. *Trial Assignment Conference; Case-Specific Management.*

- a. Notwithstanding Standing Order 1-88, the parties in all medical malpractice cases shall appear at a trial assignment conference, to be scheduled by the court not later than 18 months after filing of the complaint. The parties shall be prepared to commit to a trial date within the tracking order, as well as to dates for expert

disclosures. At the trial assignment conference, the court and parties will also select a date for a final pretrial conference at which they will file a pretrial memorandum and discuss the case's potential for resolution. The parties must discuss the potential for resolution with their clients and any other entity or individual with settlement authority, before the pretrial conference.

- b. Any party who seeks to advance the case for earlier determination pursuant to G.L. c. 231, § 59C, may file a Motion For Case-Specific Management pursuant to Superior Court Rule 20 and Standing Order 1-88(B)(2), in compliance with Superior Court Rule 9A.

8. Judicial Discretion.

After considering the impact on prompt resolution of the case and all other equities, the judge may waive any of these requirements or extend any of these deadlines. In ruling on a motion for waiver, the judge may require the moving party to demonstrate good cause and may impose conditions to facilitate timely resolution of the case or to protect the rights of any party opposing the waiver.

9. Other Rights.

Nothing in this Rule shall be construed to limit the right of any party under generally applicable statutes, rules, orders, or other law to assert or oppose any dispositive or other motion, serve any discovery request, or request a conference under Rule 16 or otherwise at any time. For purposes of this rule, any plaintiff or defendant whose claim or liability is entirely vicarious or derivative has no separate right to a tribunal beyond that asserted by the principal(s), and shall, together with the principal(s), be considered as a single party.