M.R.Civ.P.

Massachusetts Rules of Civil Procedure

Including amendments effective

January 1, 2017

Now including links to cases and statutes.

eBook edition published by the Massachusetts Trial Court Law Libraries

MASSACHUSETTS RULES OF CIVIL PROCEDURE

Massachusetts Trial Court Law Libraries

including amendments effective January 1, 2017.

Rules of Court Disclaimer

The Trial Court Law Libraries make every effort to provide a current, accurate copy of the rules of court on this site. However, this is not an official source for the rules, and the libraries cannot be held responsible for any errors or omissions contained on these pages. If you are concerned about the timeliness or accuracy of a rule, please consult one of the print sources for Massachusetts Rules of Court, or contact your nearest Trial Court Law Library for assistance.
http://www.mass.gov/lawlib
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.

This edition contains links to cases and statutes when there is a publicly available web version. In many instances, the 1973 Reporters Notes refer to statutes that have been repealed or rules that no longer exist. No links can be provided for these citations.

Table of Contents

I. Scope of Rules--One Form of Action

- Rule 1 Scope of Rules
- Rule 2 One Form of Action

II. Commencement of Action; Service of Process, Pleadings, Motions and Orders

- Rule 3 Commencement of Action
- Rule 4 Process
- Rule 4.1 Attachment
- Rule 4.2 Trustee Process
- Rule 4.3 Arrest; Supplementary Process; Ne Exeat
- Rule 5 Service and Filing of Pleadings and Other Papers
- Rule 6 Time

III. Pleadings and Motions

- Rule 7 Pleadings Allowed: Form of Motions

- Rule 8 General Rules of Pleading
- Rule 9 Pleading Special Matters
- Rule 10 Form of Pleadings
- Rule 11 Appearances and Pleadings
- Rule 12 Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on Pleadings
- Rule 13 Counterclaim and Cross-Claim
- Rule 14 Third-Party Practice
- Rule 15 Amended and Supplemental Pleadings
- Rule 16 Pre-Trial Procedure: Formulating Issues

IV. Parties

- Rule 17 Parties Plaintiff and Defendant: Capacity
- Rule 18 Joinder of Claims and Remedies
- Rule 19 Joinder of Persons Needed for Just Adjudication
- Rule 20 Permissive Joinder of Parties
- Rule 21 Misjoinder and Non-Joinder of Parties
- Rule 22 Interpleader
- Rule 23 Class Actions
- Rule 23.1 Derivative Actions by Shareholders
- Rule 23.2 Actions Relating to Unincorporated Associations
- Rule 24 Intervention
- Rule 25 Substitution of Parties

V. Deposition and Discovery

- Rule 26 General Provisions Governing Discovery
- Rule 27 Depositions Before Action or Pending Appeal
- Rule 28 Persons Before Whom Depositions May Be Taken
- Rule 29 Stipulations Regarding Discovery Procedure
- Rule 30 Depositions Upon Oral Examination
- Rule 30A Audiovisual Depositions and Audiovisual Evidence
- Rule 31 Depositions of Witnesses Upon Written Questions
- Rule 32 Use of Depositions in Court Proceedings
- Rule 33 Interrogatories to Parties
- Rule 34 Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes
- Rule 35 Physical and Mental Examination of Persons
- Rule 36 Requests for Admission

- Rule 37 Failure to Make Discovery: Sanctions

VI. Trials

- Rule 38 Jury Trial of Right
- Rule 39 Trial by Jury or by the Court
- Rule 40 Assignment of Cases for Trial: Continuances
- Rule 41 Dismissal of Actions
- Rule 42 Consolidation: Separate Trials
- Rule 43 Evidence
- Rule 44 Proof of Official Records
- Rule 44.1 Determination of Foreign Law
- Rule 45 Subpoena
- Rule 46 Exceptions Unnecessary
- Rule 47 Jurors
- Rule 48 Juries of Less Than Twelve - Majority Verdict
- Rule 49 Special Verdicts and Interrogatories
- Rule 50 Motion for a Directed Verdict and for Judgment Not-Withstanding the Verdict
- Rule 51 Argument: Instructions to Jury
- Rule 52 Findings by the Court
- Rule 53 Masters

VII. Judgment

- Rule 54 Judgments: Costs
- Rule 55 Default
- Rule 56 Summary Judgment
- Rule 57 Declaratory Judgment
- Rule 58 Entry of Judgment
- Rule 59 New Trials: Amendment of Judgments
- Rule 60 Relief from Judgment or Order
- Rule 61 Harmless Error
- Rule 62 Stay of Proceedings to Enforce a Judgment
- Rule 63 Disability of a Judge

VIII. Provisional and Final Remedies and Special Procedures

- Rule 64 Report of Case
- Rule 65: Injunctions
- Rule 65.1 Security: Proceedings Against Sureties
- Rule 65.2 Redelivery of Goods or Chattels

- Rule 65.3 Proceedings for Civil Contempt
- Rule 66 Receivers
- Rule 67 Deposit in Court
- Rule 68 Offer of Judgment
- Rule 69 Execution
- Rule 70 Judgment for Specific Acts: Vesting Title
- Rule 71 Process in Behalf of and Against Persons Not Parties
- Rule 72 Probate Accounts Repealed effective January 2, 2012. For rule effective January 2, 2012, see Supplemental Probate and Family Court Rule 72.
- [Rules 73-76 RESERVED]

IX. Courts and Clerks

- Rule 77 Courts and Clerks
- Rule 78 Motion Day
- Rule 79 Books and Records Kept by the Clerk and Entries Therein
- Rule 80 Stenographic Report or Transcript

X. General Provisions

- Rule 81 Applicability of Rules
- Rule 82 Jurisdiction and Venue Unaffected
- Rule 83 Supplemental Rules
- Rule 84 Forms (repealed effective January 1, 2017.)
- Rule 85 Title

Rule 1: Scope of Rules

These rules govern the procedure before a single justice of the Supreme Judicial Court or of the Appeals Court, and in the following departments of the Trial Court: the Superior Court, the Housing Court the Probate and Family Court in proceedings seeking equitable relief, the Juvenile Court in proceedings seeking equitable relief, in the Land Court, in the District Court and in the Boston Municipal Court, in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

As used in these rules the following terms shall be deemed to have the following meanings:

"Superior Court" shall mean the Superior Court Department of the Trial Court, or a session thereof for holding court.

"Housing Court" shall mean a division of the Housing Court Department of the Trial Court, or a session thereof for holding court.

"Probate Court" shall mean a division of the Probate and Family Court Department of the Trial Court, or a session thereof for holding court.

"Land Court" shall mean the Land Court Department of the Trial Court, or a session thereof for holding court.

"District Court" or "Municipal Court" shall mean a division of the District Court Department of the Trial Court, or a session thereof for holding court; except when the context means something to the contrary, said words shall include the Boston Municipal Court Department.

"Municipal Court of the City of Boston" or "Boston Municipal Court" shall mean a division of the Boston Municipal Court Department of the Trial Court, or a session thereof for holding court.

"Juvenile Court" shall mean the Juvenile Court Department of the Trial Court, or a session thereof for holding court.

Amended June 27, 1974, effective July 1, 1974; November 9, 1979, effective January 1, 1980; December 13, 1981, effective January 1, 1982; amended effective June 8, 1989; July 1, 1996; amended April 5, 2007, effective June 1, 2007; amended November 28, 2007, effective March 1, 2008; amended June 29, 2016, effective August 1, 2016.

Reporter's Notes

Reporter's Notes (2016) The amendment to Rule 1, adopted from the Federal Rules of Civil Procedure, changed the second sentence of the first paragraph so that it reads: "They [the Massachusetts Rules of Civil Procedure] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

The purpose of the change was to acknowledge that both the court and the parties have the obligation to employ the rules for the purposes set forth.

Reporter's Notes (2008): The definition of "Municipal Court of the City of Boston" has been amended in light of legislation in 2003 transferring various Divisions of the District Court Department located in Suffolk County to the Boston Municipal Court. See G.L. c. 218, s. 1 and G.L. c. 218, s. 50. Whenever the term "District Court" is used in the Massachusetts Rules of Civil Procedure, the reference is to be construed as including the Boston Municipal Court, unless "the context means something to the contrary." Mass. R. Civ. P. 1, sixth definition.

Reporter's Notes (2007): The 2007 amendments to Rule 1 make the Massachusetts Rules of Civil Procedure applicable to proceedings in the Juvenile Court where equitable relief

is sought. For example, a civil action brought in the Juvenile Court seeking specific performance of a post-adoption contract (G. L. c. 210, s. 6D) will be governed by the Massachusetts Rules of Civil Procedure.

Reporter's Notes (1996): With the merger of the District/Municipal Courts Rules of Civil Procedure into the Massachusetts Rules of Civil Procedure in 1996, minor changes have been made to Rule 1 with the addition of references to the District Court and to the Boston Municipal Court.

Reporter's Notes (1973): This rule is substantially the same as Federal Rule 1, substituting Massachusetts references for those of the United States. The rules apply to cases at law or in equity. (See Rule 2 for merger of law and equity.) The reference in Rule 1 to cases at law or in equity in no way attempts to enlarge the jurisdiction of any court.

In cases of concurrent jurisdiction, the litigation is controlled by the rules applicable in the court where the action rests. Thus an action for divorce which is triable in either the Probate Court or the Superior Court, is, when commenced in the Superior Court, controlled by these rules, even though if, had it been commenced in the Probate Court, it would be controlled by the extant Probate Court rules. Cases involving switches between the Superior Court and a district court or the Boston Municipal Court are governed by Rule 81(f) and 81(g). See also Rule 13(j).

Rule 2: One Form of Action

There shall be one form of action to be known as "civil action".

Effective July 1, 1974.

Reporter's Notes (1973): "Merger" of Law and Equity, refers only to the *procedure* involved, i.e., the manner of framing and trying the issues, and the type of relief. "Merger" does not alter the traditional substantive distinctions between legal and equitable *remedies.* Although the once separate procedures have been merged, the right to equitable remedies still exists; now, however, a party may seek legal and equitable relief simultaneously. All issues in a dispute, legal or equitable, may now be tried in the same form and in the same action. Grauman v. City Company of New York, 31 F.Supp. 172 (S.D.N.Y.1939). Unified procedure takes away no rights in either law or equity; rather, it merely affords a more simple and effective way of enforcing such rights.

Rule 2 also abolishes distinctive "forms of action". Henceforth all litigation, whatever the claimed basis for relief, will be known as "civil action". A plaintiff need only plead those facts necessary to show that he is entitled to a relief which the law recognizes; he need not frame his action into one of several possible forms of action. In Nester v. Western

Union Telegraph Co., 25 F.Supp. 478, 481 (S.D.Cal.1938) the court discussed the effect of Federal Rule 2:

Under the liberal rules of reformed procedure, a plaintiff is entitled to recover not on the basis of allegations of damages or of his theory of damages but rather on the basis of the facts as to damages shown in the record....

Differences in the forms of claims being abolished, the plaintiff should be denied relief only when under the facts proved, he is entitled to none.

Rule 2 relates to several other rules. Rule 8(a) allows a party to demand "relief in the alternative or of several different types"; Rule 8(e) allows a party to "state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds;" Rule 18(a) allows a party to join "as many claims, legal or equitable as he has against an opposing party"; Rule 13(a) demands that a pleader with certain exceptions, assert as a counterclaim "any claim" which the pleader has against the opposing party if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim; Rule 13(b) permits a pleader to assert as a counterclaim "any claim" regardless of its connection with the opposing party's claim.

Because Massachusetts previously maintained a separate procedural system for actions at law and suits in equity, the merger of the two systems brings about a substantial change in existing practice.

Rule 2, together with Rule 13(a), makes the assertion of a legal or equitable counterclaim compulsory if it arises out of the same transaction or occurrence (subject to the specific exceptions of Rule 13(a)), regardless of the nature of the counterclaim.

Rule 2 abolishes the previously existing tripartite division of personal action: (1) Contracts, including assumpsit, covenant, debt; (2) Tort, including trespass, trespass on the case, trover; and (3) Replevin.

The kind of relief previously afforded by either legal or equitable replevin is available under Rule 2. However the right of the plaintiff in a replevin action to obtain immediate possession of the property by the delivery of a bond is abolished.

For a complete discussion of the effect of the law-equity merger on the right to a jury trial see the Reporters' Notes to Rule 38.

Rule 3: Commencement of Action

A civil action is commenced by (1) mailing to the clerk of the proper court by certified or registered mail a complaint and an entry fee prescribed by law, or (2) filing such complaint and an entry fee with such clerk. Actions brought pursuant to G.L. c. 185 for registration or confirmation shall be commenced by filing a surveyor's plan and complaint on a form furnished by the Land Court.
Amended December 13, 1981, effective January 1, 1982.

Reporter's Notes (1973): Rule 3, substantially enlarges Federal Rule 3, and drastically alters prior Massachusetts practice, by eliminating the trifurcation of delivery to an officer, service, and "entry". Henceforth, an action is considered commenced, for all purposes, including the applicable statute of limitations, when either the plaintiff mails to the clerk the complaint and any required entry fee, *or* the clerk *receives* the complaint and the fee. The requirement of certified or registered mail is calculated to minimize problems of proof. The phrase "proper court" means the court in which requirements of venue and jurisdiction (personal and subject matter) are met.

Rule 4: Process

(a) **Summons: Issuance.** Upon commencing the action the plaintiff or his attorney shall deliver a copy of the complaint and a summons for service to the sheriff, deputy sheriff, or special sheriff; any other person duly authorized by law; a person specifically appointed to serve them; or as otherwise provided in subdivision (c) of this rule. Upon request of the plaintiff separate or additional summons shall issue against any defendant. The summons may be procured in blank from the clerk, and shall be filled in by the plaintiff or the plaintiff's attorney in accordance with Rule 4(b).

(b) **Same: Form.** The summons shall bear the signature or facsimile signature of the clerk; be under the seal of the court; be in the name of the Commonwealth of Massachusetts; bear teste of the first justice of the court to which it shall be returnable who is not a party; contain the name of the court and the names of the parties; be directed to the defendant; state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend; and shall notify him that in case of his failure to do so judgment by default may be rendered against him for the relief demanded in the complaint.

(c) **By Whom Served.** Except as otherwise permitted by paragraph (h) of this rule, service of all process shall be made by a sheriff, by his deputy, or by a special sheriff; by any other person duly authorized by law; by some person specially appointed by the court for that purpose; or in the case of service of process outside the Commonwealth, by an individual permitted to make service of process under the law of this Commonwealth or under the law of the place in which the service

is to be made, or who is designated by a court of this Commonwealth. A subpoena may be served as provided in Rule 45. Notwithstanding the provisions of this paragraph (c), wherever in these rules service is permitted to be made by certified or registered mail, the mailing may be accomplished by the party or his attorney.

(d) **Summons: Personal Service Within the Commonwealth.** The summons and a copy of the complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual by delivering a copy of the summons and of the complaint to him personally; or by leaving copies thereof at his last and usual place of abode; or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by statute to receive service of process, provided that any further notice required by such statute be given. If the person authorized to serve process makes return that after diligent search he can find neither the defendant, nor defendant's last and usual abode, nor any agent upon whom service may be made in compliance with this subsection, the court may on application of the plaintiff issue an order of notice in the manner and form prescribed by law.

(2) Upon a domestic corporation (public or private), a foreign corporation subject to suit within the Commonwealth, or an unincorporated association subject to suit within the Commonwealth under a common name: by delivering a copy of the summons and of the complaint to an officer, to a managing or general agent, or to the person in charge of the business at the principal place of business thereof within the Commonwealth, if any; or by delivering such copies to any other agent authorized by appointment or by law to receive service of process, provided that any further notice required by law be given. If the person authorized to serve process makes return that after diligent search he can find no person upon whom service can be made, the court may on application of the plaintiff issue an order of notice in the manner and form prescribed by law.

(3) Upon the Commonwealth or any agency thereof by delivering a copy of the summons and of the complaint to the Boston office of the Attorney General of the Commonwealth, and, in the case of any agency, to its office or to its chairman or one of its members or its secretary or clerk. Service hereunder may be effected by mailing such copies to the Attorney General and to the agency by certified or registered mail.

(4) Upon a county, city, town or other political subdivision of the Commonwealth subject to suit, by delivering a copy of the summons and of the complaint to the treasurer or the clerk thereof; or by leaving such copies at the office of the treasurer or the clerk thereof with the person then in charge thereof; or by mailing such copies to the treasurer or the clerk thereof by registered or certified mail.

(5) Upon an authority, board, committee, or similar entity, subject to suit under a common name, by delivering a copy of the summons and of the complaint to the chairman or other

chief executive officer; or by leaving such copies at the office of the said entity with the person then in charge thereof; or by mailing such copies to such officer by registered or certified mail.

(6) In any action in which the validity of an order of an officer or agency of the Commonwealth is in any way brought into question, the party questioning the validity shall forthwith forward to the Attorney General of the Commonwealth by hand or by registered or certified mail a brief statement indicating the order questioned.

(e) **Same: Personal Service Outside the Commonwealth**. When any statute or law of the Commonwealth authorizes service of process outside the Commonwealth, the service shall be made by delivering a copy of the summons and of the complaint: (1) in any appropriate manner prescribed in subdivision (d) of this Rule; or (2) in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction; or (3) by any form of mail addressed to the person to be served and requiring a signed receipt; or (4) as directed by the appropriate foreign authority in response to a letter rogatory; or (5) as directed by order of the court.

(f) **Return**. The person serving the process shall make proof of service thereof in writing to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a sheriff, deputy sheriff, or special sheriff, he shall make affidavit thereof. Proof of service outside the Commonwealth may be made by affidavit of the individual who made the service or in the manner prescribed by the law of the Commonwealth, or the law of the place in which the service is made for proof of service in an action in any of its courts of general jurisdiction. When service is made by mail, proof of service shall include a receipt signed by the addressee or such other evidence of personal delivery to the addressee as may be satisfactory to the court. Failure to make proof of service does not affect the validity of the service.

(g) **Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process is issued.

(h) **Certain Actions in Probate Courts**: Service. Notwithstanding any other provision of these rules, in actions in the Probate Courts in the nature of petitions for instructions or for the allowance of accounts service may be made in accordance with G.L. c. 215, § 46, in such manner and form as the court may order.

(i) **Land Court**. In actions brought in the Land Court, service shall be made by the court where so provided by statute.

(j) **Summons**: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 90 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that

period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Amended February 24, 1975, effective July 1, 1974; December 17, 1975, effective January 1, 1976; June 2, 1976, effective July 1, 1976; December 13, 1982, effective January 1, 1982; March 29, 1988, effective July 1, 1988.

Reporter's Notes (1996): With the merger of the District/Municipal Courts Rules of Civil Procedure into the Massachusetts Rules of Civil Procedure in 1996, two differences that had existed between the two sets of rules have been eliminated. Prior to the merger, the District Court version of Rule 4(f) required proof of service to be made to the court and to the party; in addition, the District Court version included constables among those who are not required to make an affidavit of service. The merged set of rules adopts the version of Rule 4(f) contained in the Massachusetts Rules of Civil Procedure. Under the merged set of rules, proof of service in the District Court is required to be made only to the court and constables are required to make affidavit of service.

It should be noted that there may be additional requirements in connection with service of process imposed by statute. See, for example, G.L. c. 223, § 31, which provides that where service is made at the defendant's last and usual place of abode in District Court actions, "the officer making service shall forthwith mail first class a copy of the summons to such last and usual place of abode. The date of mailing and the address to which the summons was sent shall be set forth ... in the officer's return."

Reporter's Notes (1975) : Rule 4(c) has been amended to make clear that process in the types of actions covered by Rule 4(h) need not be served by any of the individuals enumerated in Rule 4(c).

Rule 4(h) has been inserted to correct a serious inconvenience resulting from the apparent applicability to such Probate Court matters as petitions for instructions and accounts of Rule 4's general service requirements. If Rule 4, as originally promulgated, applied to this type of case, the cost of service might frequently assume excessive proportions. A petition for instructions involving a trust with numerous beneficiaries could require substantial service charges; an account in a common trust fund with over a thousand participants would impose massive expenses.

Prior to July 1, 1974, it was unquestioned that notice of the pendency of a petition for instructions, or the presentation for allowance of an account could be--and invariably was--effected by citation, served in hand or by publication. Moreover, a statute, G.L. c. 215, § 46, authorized the court to direct service to be made by registered mail, thus permitting appreciable saving in service costs. (Another statute, G.L. c. 4, § 7, equating certified mail with registered mail for this purpose, permitted an even less expensive procedure.)

As the amendatory legislation accompanying the Rules, Acts, 1974, c. 1114, repealed neither G.L. c. 215, § 46, nor G.L. c. 4, § 7, many probate courts continued to issue citations in the old form even after July 1, 1974. Others required service in accordance with Rule 4.

To eliminate the confusion, and to maximize flexibility in the particular class of actions affected, Rule 4(h) now explicitly approves both methods of procedure: In any Probate Court action seeking instructions or the allowance of an account, service may--but need not--be made by citation. In those rare cases whose strategy dictates service by an officer, the usual Rule 4 procedure is available.

Although the change in Rule 4(c) and the language of Rule 4(h) are both declaratory of existing practice as to accounts, the Supreme Judicial Court, in the order of February 24, 1975 promulgating the amendments, specifically made the new material retroactive to July 1, 1974. Thus service between July 1, 1974 and February 24, 1975 was valid, so long as it was made either: (1) In accordance with a citation; or (2) In accordance with Rule 4.

Reporter's Notes (1973): Rule 4 deals with process and service. It extensively changes Federal Rule 4 to meet state conditions and to adopt such existing state law as the "long-arm" statute, G.L. c. 223A, §§ 1-8.

Rule 4(a), unlike Federal Rule 4(a), puts the onus of delivering process to the server upon the plaintiff or his attorney, rather than upon the clerk. It explicitly allows the plaintiff or the attorney to obtain the blank summons form in advance.

Rule 4(c) permits special court appointment of process servers.

Rule 4(d) somewhat changes the Massachusetts rule that in actions of tort or contract, not involving an attachment, the summons need not contain a copy of the declaration. Under Rule 4(d), the summons does not *contain* the complaint, but the two must be served together.

Rule 4(d)(1) allows process to be "left at [defendant's] last and usual place of abode," G.L. c. 223, § 31. The Rule makes clear that service on a statutorily authorized agent may also require the giving of additional notice, and that the plaintiff must consult the statute and fulfill its requirements. If service in any of the modes prescribed by Rule 4(d)(1) is impossible, the plaintiff may obtain an order of notice. See G.L. c. 223, § 34; c. 227, § 7. Divorce proceedings brought in the Superior Court, c. 208, § 6, although governed by these rules, are, in matters of notice and service, controlled by G.L. c. 208, § 8.

Rule 4(d)(1) incorporates prior law covering service upon infants and incompetents. No statute treats the situation precisely, of G.L. c. 206, § 24. At common law, an infant or an incompetent must be served like any other defendant, and service must precede the appointment of a guardian ad litem, Taylor v. Lovering, 171 Mass. 303, 306, 50 N.E.

612, 613 (1898); Reynolds v. Remick, 327 Mass. 465, 469, 470-471, 99 N.E.2d 279, 281-282 (1951).

Rule 4(d)(2) governs service upon a business entity. Basically, it allows the entity to be served via its officers, manager, or service-receiver designated by appointment or statute. A domestic entity may, alternatively, be served by leaving the papers at the principal office with the person in charge of the business. This somewhat widens prior Massachusetts practice. For an example of the kind of statutory notice covered by the proviso clause of Rule 4(d)(2), see G.L. c. 181, § 4. The "order-of-notice" provision follows Rule 4(d)(1).

Rule 4(d)(2), unlike the cognate Federal Rule, does not refer to "partnerships". Because Massachusetts law so clearly treats partners as individuals for purposes of suit, Shapira v. Budish, 275 Mass. 120, 126, 175 N.E. 159, 161 (1931), use of the federal language would work an undesirable change in substantive law.

Rule 4(d)(3), like Federal Rule 4(d)(4), covers service upon the sovereign or one of its agencies. Service is complete upon delivery to the Attorney General's office *or* upon the mailing of the papers to him by registered or certified mail.

Rule 4(d)(4) governs service upon political subdivisions of the Commonwealth subject to suit. It simplifies the procedure set out in G.L. c. 223, § 37, and applies the principles of the rest of Rule 4 to service of political subdivisions. Rule 4(d)(4) requires the plaintiff to bring the fact of suit to the attention of the person who is most likely to sound the litigational alarm; but it does not require him to do more.

Rule 4(d)(5) applies the principles of Rule 4(d) to service of public entities subject to suit under a common name.

Rule 4(d)(6) is designed to ensure that the Attorney General receives prompt notification of any possible court test (however collateral) of an order of an officer or agency of the Commonwealth. The Rule seeks to minimize the inconvenience to the public which results when such test does not come to the Attorney General's attention until late in the litigation. Rule 4(d)(6) is therefore a mandate of convenience. Failure to observe it will not vitiate otherwise valid service; courts should, however, be alert to compel observance of its requirements.

Rule 4(e) controls out-of-state service. It embodies the procedure set out in the long-arm statute (G.L. c. 223A, §§ 6-7), which in turn relied heavily upon Federal Rule 4(i) (a section omitted, therefore, from these rules). Rule 4(e) is largely self-explanatory and is flexible enough, when read with Rule 4(d)(1) and (2) and G.L. c. 223, § 37; c. 223A, §§ 1-3, to cover most order-of-notice situations. See also c. 227, § 7.

Rule 4(f) requires direct filing by the server. It should be emphasized that any delay by the process server does not bar the plaintiff. See Peeples v. Ramspacher, 29 F.Supp. 632, 633 (E.D.S.C.1939).

Rule 4(g) tracks Federal Rule 4(h) verbatim. It follows the spirit of the Federal Rules, refusing to allow "technicalities" to obstruct justice. See Rule 15 (covering amendments to pleadings) and Rule 60 (covering relief from judgments). It will work no substantial change in Massachusetts practice. See G.L. c. 231, § 51.

Rule 4.1: Attachment

(a) **Availability of Attachment**. Subsequent to the commencement of any action under these rules, real estate, goods and chattels and other property may, in the manner and to the extent provided by law, but subject to the requirements of this rule, be attached and held to satisfy the judgment for damages and costs which the plaintiff may recover.

(b) **Writ of Attachment: Form**. The writ of attachment shall bear the signature or facsimile signature of the clerk, be under the seal of the court, be in the name of the Commonwealth, contain the name of the court, the names and residences (if known) of the parties and the date of the complaint, bear teste of the first justice of the court to which it is returnable who is not a party; state the name and address of the plaintiff's attorney (if any), be directed to the sheriffs of the several counties or their deputies, or any other person duly authorized by law, and command them to attach the real estate or personal property of the defendant to the value of an amount approved by the court, and to make due return of the writ with their doings thereon. The writ of attachment shall also state the name of the justice who entered the order approving attachment of property and the date thereof.

(c) **Same: Service**. The writ of attachment may be procured in blank from the clerk and shall be filled out by the plaintiff or plaintiff's attorney as provided in subdivision (b) of this rule, either of whom shall deliver to the officer making the attachment the original writ of attachment upon which to make his return and a copy thereof.

No property may be attached unless such attachment for a specified amount is approved by order of the court. Except as provided in subdivision (f) of this rule, the order of approval may be entered only after notice to the defendant and hearing and upon a finding by the court that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment over and above any liability insurance shown by the defendant to be available to satisfy the judgment.

An action in which attachment of property is sought may be commenced only by filing the complaint with the court, together with a motion for approval of the attachment. The motion shall be supported by affidavit or affidavits meeting the requirements set forth in subdivision (h) of this

rule. Except as provided in subdivision (f) of this rule, the motion and affidavit or affidavits with the notice of hearing thereon shall be served upon the defendant in the manner provided by Rule 4, at the same time the summons and complaint are served upon him.

Inclusion of a copy of the complaint in the notice of hearing shall not constitute personal service of the complaint upon the defendant. The notice shall inform the defendant that by appearing to be heard on the motion for approval of an attachment he will not thereby submit himself to the jurisdiction of the court nor waive service of the complaint and summons upon him in the manner provided by law.

Except as provided in subdivision (e) of this rule, any attachment of property shall be made within 30 days after the order approving the writ of attachment. When attachments of any kind of property are made subsequent to service of the summons and complaint upon the defendant, a copy of the writ of attachment with the officer's endorsement thereon of the date or dates of the attachments shall be promptly served upon the defendant in the manner provided by Rule 5.

(d) **Attachment on Counterclaim, Cross-Claim or Third-Party Complaint**. An attachment may be made by a party bringing a counterclaim, a cross-claim, or a third-party complaint in the same manner as upon an original claim.

(e) **Subsequent Attachment**. Either before or after expiration of the applicable period prescribed in subdivision (c) of this rule for making attachments, the court may, subject to the provisions of subdivision (f) of this rule, order another or an additional attachment of real estate, goods, and chattels or other property.

(f) **Ex Parte Hearings on Property Attachments**. An order approving attachment of property for a specific amount may be entered ex parte upon findings by the court that there is a reasonable likelihood that the plaintiff will recover judgment in an amount equal to or greater than the amount of the attachment over and above any liability insurance known or reasonably believed to be available, and that either (i) the person of the defendant is not subject to the jurisdiction of the court in the action, or (ii) there is a clear danger that the defendant if notified in advance of attachment of the property will convey it, remove it from the state or will conceal it, or (iii) there is immediate danger that the defendant will damage or destroy the property to be attached. The motion for such ex parte order shall be accompanied by a certificate by the plaintiff or his attorney of the amount of any liability insurance which he knows or has reason to believe will be available to satisfy any judgment against the defendant in the action. The motion, in the filing of which the plaintiff's attorney shall be subject to the obligations of Rule 11shall be supported by affidavit or affidavits meeting the requirements set forth in subdivision (h) of this rule.

(g) **Dissolution or Modification of Ex Parte Attachments**. On two days' notice to the plaintiff or on such shorter notice as the court may prescribe, a defendant whose real or personal property has been attached pursuant to an ex parte order entered under subdivision (f) of this rule may appear without thereby submitting his person to the jurisdiction of the court, and move the

dissolution or modification of the attachment, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. At such hearing the plaintiff shall have the burden of justifying any finding in the ex parte order which the defendant has challenged by affidavit. Nothing herein shall be construed to abolish or limit any means for obtaining dissolution, modification or discharge of an attachment that is otherwise available by law.

(h) **Requirements for Affidavits**. Affidavits required by this rule shall set forth specific facts sufficient to warrant the required findings and shall be upon the affiant's own knowledge, information or belief; and, so far as upon information and belief, shall state that he believes this information to be true.

(i) **Form of Hearing**. At any hearing held under this rule, either party may adduce testimony and may call witnesses (including any opposing party). The court, for cause shown on the evidence so adduced, may make such interlocutory orders concerning disposition of the property sought to be attached as justice may require.

Amended June 27, 1974, effective July 1, 1974.

Reporter's Notes (1973): Rule 4.1, like Rules 4.2 and 4.3, does not appear in the Federal Rules, which look to "the law of the state in which the district court is held." Federal Rule 64. The practitioner should realize that attachment under Rule 4.1 does not discharge the plaintiff's obligation to effectuate service of the summons and complaint as specified in Rule 4.

The rule, conforming to recent decisional abrogations of the right to attach, does not otherwise substantially change Massachusetts practice: it limits the use of the attachment process to what the law now permits. G.L. c. 223, §§ 42-83A contain detailed regulations pertaining to attachment. These are obviously too minute and lengthy for insertion in a set of procedural rules, but the practitioner contemplating any sort of attachment of any type of property, real or personal, is strongly urged to consult the statute.

Rule 4.1(b) does not significantly alter Massachusetts law, under which the clerk must sign the writ. See Moriarty v. King, 317 Mass. 210, 213-214, 57 N.E.2d 633, 635-636 (1944). See also G.L. c. 223, §§ 16, 21. The Massachusetts writ must be under seal, see G.L. c. 223, §§ 16, 21; see also Const.Pt. 2, c. 6, art. 5, and must bear the teste of the first justice of the court to which it is returnable; see G.L. c. 223, §§ 16, 21; see also Const.Pt. 2, c. 6, art. 5, and must identify the parties; Tyler v. Boot & Shoe Workers Union, 285 Mass. 54, 55, 188 N.E. 509, 510 (1933); see also G.L. c. 214, § 12. An attachment of land or of an interest therein must contain the name and last known residence of the defendant. G.L. c. 223, § 62. An attachment of goods also must describe the defendant. See Eaton v. Walker, 244 Mass. 23, 30, 138 N.E. 798, 800 (1923). A Massachusetts writ, under present practice, contains the date of its issuance, which is prima facie evidence of the time of the bringing of the action. Moriarty v. King, 317 Mass. 210, 214, 57 N.E.2d 633,

636 (1944); see also Lapp Insulator Co., Inc. v. Boston and Maine Railroad, 330 Mass. 205, 213, 112 N.E.2d 359, 364 (1953). Massachusetts writs run throughout the Commonwealth, G.L. c. 223, § 20; this will be true under Rule 4.1(b). Like Rule 4.1(b), present statutory practice limits the attachment to the amount of the claim, plus interest and costs. G.L. c. 223, § 42A; see also G.L. c. 223, § 114. If attachment is made subsequent to service of the original complaint and summons, Rule 4.1(c) requires service upon the defendant of a copy of the writ of attachment which must contain a copy of any endorsement by the officer on the original writ. Such service, although it must be made "promptly" (that is, as soon as may be), may be made by mailing the copy to the defendant's attorney, or to the defendant, if he is unrepresented. See Rule 5(b).

Rule 4.1(c) changes Massachusetts practice as to service of the summons. After the attachment of a resident defendant's property, Massachusetts formerly required that a separate summons be served on the defendant stating the value of the goods attached. The service of that summons constituted sufficient service of the original summons. See G.L. c. 223, § 17; Callaghan v. Whitmarsh, 145 Mass. 340, 341, 14 N.E. 149, 151 (1887); Wilbur v. Ripley, 124 Mass. 468, 469 (1878). Service upon a non-resident was accomplished in the same manner, if the court could acquire sufficient personal jurisdiction. Peabody v. Hamilton, 106 Mass. 217, 220 (1870).

In an equity suit, the court generally issued a subpoena, served in the same manner as an original writ of summons. See G.L. c. 214, § 7 and Squire v. Lincoln, 137 Mass. 399, 403 (1884). A defendant was given a copy of an original summons or subpoena. G.L. c. 223, § 41.

Rule 4.1(c)'s limitation of thirty days changes Massachusetts practice. G.L. c. 223, § 30 allows the summons to be served at any time after the attachment has been made, if it is served the required number of days before the return day for the service of the original writ. The equity practice is the same as the practice at law, former G.L. c. 223, § 41.

Rule 4.1(c), establishes a basic procedure to ensure that attachment of defendant's property (real or personal) hews to constitutional lines. Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Schneider v. Margossian, 349 F.Supp. 741, 745 (D.Mass.1972); Bay State Harness Horse Racing & Breeding Association v. PPG Industries, 365 F.Supp. 1299 (D.Mass.1973). Rule 4.1(f) affords a remedy against plaintiff's unfairly being deprived of security for his judgment.

The basic principle--no attachment without a prior court order after notice and hearing--is thus subject to limited exception if fair security is imperilled. And even this exception requires a court hearing (albeit ex parte) on a motion supported by affidavits. See Rule 4.1(h) and 4.1(i). Moreover the procedure for dissolution of an attachment obtained ex parte is summary and weighted in defendant's favor.

Rule 4.1(d)'s allowing of attachment in the case of a counterclaim, a cross-claim, or a third party complaint did not formerly exist in Massachusetts practice.

Rule 4.1(e) is similar to existing practice, G.L. c. 223, § 85, and covers two situations: (1) cases in which attachment is made for the first time, after service of process; (2) cases in which attachment was made when process was served, and an additional attachment is sought thereafter.

Rule 4.2: Trustee Process

(a) **Availability of Trustee Process**. Subsequent to the commencement of any personal action under these rules, except actions only for specific recovery of goods and chattels, for malicious prosecution, for slander or libel, or for assault and battery, trustee process may be used, in the manner and to the extent provided by law, but subject to the requirements of this rule, to secure satisfaction of the judgment for damages and costs which the plaintiff may recover, provided, however, that no person shall be adjudged trustee for any amount due from him to the defendant for wages or salary for personal labor or services of the defendant except on a claim that has first been reduced to judgment or otherwise authorized by law; and in no event shall the attachment exceed the limitations prescribed by law.

(b) **Summons to Trustee**: Form. The summons to a trustee shall bear the signature or facsimile signature of the clerk, be under the seal of the court, be in the name of the Commonwealth, contain the name of the court, the names and residences (if known) of the parties and the date of the filing of the complaint, bear teste of the first justice of the court to which it is returnable who is neither a party nor a trustee; state the name and address of the plaintiff's attorney (if any), be directed to the trustee, shall notify him that the goods, effects or credits of the defendant in the hands of the trustee have been attached to the value of the amount authorized by the court, shall state the time within which these rules require the trustee to answer, shall notify him that in case of his failure to do so he will be defaulted and adjudged trustee as alleged, and, if wages, a pension, or a bank account is sought to be attached, shall notify him of such amount of wages, pension, or bank account as are by law exempt from attachment and shall direct him to pay over to the defendant the exempted amount. The summons to the trustee shall also state the name of the justice who entered the order approving the trustee attachment and the date thereof.

(c) **Same: Service**. The trustee summons may be procured in blank from the clerk and shall be filled out by the plaintiff or the plaintiff's attorney as provided in subdivision (b) of this rule, either of whom shall deliver to the person who is to make service the original trustee summons upon which to make his return and a copy thereof.

No trustee summons may be served unless attachment on trustee process for a specified amount has been approved by order of the court. Except as provided in subdivision (g) of this rule, the order of approval may be entered only after notice to the defendant and hearing and upon a finding by the court that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the trustee process over and above any liability insurance shown by the defendant to be available to satisfy the judgment.

An action in which trustee process is sought may be commenced only by filing the complaint with the court, together with a motion for approval of attachment on trustee process. The motion shall be supported by affidavit or affidavits meeting the requirements set forth in Rule 4.1(h) provided in subdivision (g) of this rule, the motion and affidavit or affidavits with the notice of hearing thereon shall be served upon the defendant in the manner provided by Rule 4, at the same time the summons and complaint are served upon him; and the defendant shall also be served with a copy of the trustee summons in cases where attachment has been approved ex parte as provided in subdivision (g) of this rule. Inclusion of a copy of the complaint in the notice of hearing shall not constitute personal service of the complaint upon the defendant. The notice shall inform the defendant that by appearing to be heard on the motion for approval of an attachment on trustee process he will not thereby submit himself to the jurisdiction of the court nor waive service of the complaint and summons upon him in the manner provided by law.

Except as provided in subdivision (f) of this rule, any trustee process shall be served within 30 days after the date of the order approving the attachment. Promptly after the service of the trustee summons upon the trustee or trustees, a copy of the trustee summons with the officer's endorsement thereon of the date or dates of services shall be served upon the defendant in the manner provided by Rule 5.

(d) **Answer by Trustee**; Subsequent Proceedings. A trustee shall file, but need not serve, his answer, under oath, or signed under the penalties of perjury, within 20 days after the service of the trustee summons upon him, unless the court otherwise directs. The answer shall disclose plainly, fully, and particularly what goods, effects or credits, if any, of the defendant were in the hands or possession of the trustee when the trustee summons was served upon him. The proceedings after filing of the trustee's answer shall be as provided by law.

(e) **Trustee Process on Counterclaim, Cross-Claim or Third-Party Complaint**. Trustee process may be used by a party bringing a counterclaim, a cross-claim, or a third-party complaint in the same manner as upon an original claim. Such party may use trustee process, even though the trustee does not reside or maintain a usual place of business in the county where the action is pending.

(f) **Subsequent Trustee Process**. Either before or after expiration of the applicable period prescribed in subdivision (c) of this rule for serving trustee process, the court may, subject to the

provisions of subdivision (g) of this rule, order another or an additional service of the trustee summons upon the original trustee.

(g) **Ex Parte Hearings on Trustee Process.** An order approving trustee process for a specific amount may be entered ex parte upon findings by the court that there is a reasonable likelihood that the plaintiff will recover judgment in an amount equal to or greater than the amount of the trustee process over and above any liability insurance known or reasonably believed to be available, and that either (i) the person of the defendant is not subject to the jurisdiction of the court in the action, or (ii) there is a clear danger that the defendant if notified in advance of the attachment on trustee process will withdraw the goods or credits from the hands and possession of the trustee and remove them from the state or will conceal them, or (iii) there is immediate danger that the defendant will dissipate the credits, or damage or destroy the goods to be attached on trustee process. The motion for an ex parte order shall be accompanied by a certificate by the plaintiff or his attorney of the amount of any liability insurance which he knows or has reason to believe will be available to satisfy any judgment against the defendant in the action. The motion, in the filing of which the plaintiff's attorney shall be subject to the obligations of Rule 11, shall be supported by affidavit or affidavits meeting the requirements set forth in Rule 4.1(h)

(h) Dissolution or Modification of Ex Parte Trustee Process. On two days' notice to the plaintiff or on such shorter notice as the court may prescribe, a defendant whose goods or credits have been attached on trustee process pursuant to an ex parte order entered under subdivision (g) of this rule may appear, without thereby submitting his person to the jurisdiction of the court, and move the dissolution or modification of the trustee process, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. At such hearing the plaintiff shall have the burden of justifying any finding in the ex parte order which the defendant has challenged by affidavit. Nothing herein shall be construed to abolish or limit any means for obtaining dissolution, modification or discharge of an attachment that is otherwise available by law.

(i) **Form of Hearing**. At any hearing held under this rule, either party may adduce testimony and may call witnesses (including any opposing party). The court, for cause shown on the evidence so adduced, may make such interlocutory orders concerning disposition of the goods or credits sought to be subject to trustee process as justice may require.

Amended June 27, 1974, effective July 1, 1974.

Reporter's Notes (1994) : The ninth paragraph of the Reporters' Notes to Rule 4.2 states in part that Rule 4.2(c) requires service of the trustee summons within 30 days after commencement of the action. In fact, Rule 4.2(c) requires service of the trustee process within 30 days after the order of approval of the trustee attachment.

Reporter's Notes (1974)(: Rule 4.2 indicates the availability of trustee process as a means of commencing a lawsuit and of securing any potential judgment. It does not

appear in the Federal Rules, which refer to state procedure. The rule, based on Maine and Rhode Island variants, does not attempt to cover the subject completely; it specifically refers to "law" as a supplement to the rule's provisions. G.L. c. 246 is entirely devoted to trustee process; the attorney contemplating use of such process ought certainly to consult the statute before proceeding.

Rule 4.2, like Rule 4.1 has been drafted to meet constitutional requirements. Its provisions as to notice and hearing (Rule 4.2(c)); ex parte hearings (Rule 4.2(g)); affidavits (Rule 4.2(g)), incorporating (Rule 4.1(h)); and dissolution of attachment (Rule 4.2(h)) parallel Rule 4.1, which together with its Reporters' Notes, should be consulted. See also Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); 15 U.S.C. §§ 1671-1677 (the Federal Consumer Protection Act).

Rule 4.2(a) and Form 2-A in the Appendix of Forms capsulize the most important basic existing rules pertaining to trustee process: (1) The types of action in which it is unavailable (G.L. c. 246, §§ 1, 32); (2) The preferred position of wages, pensions, and salaries generally (G.L. c. 246, §§ 28, 32); and (3) The ceiling on trustee attachment of wages, pensions and bank accounts (G.L. c. 246, §§ 28, 28A).

Certain actions cannot be commenced by trustee process at all, others not unless a bond is filed. See G.L. c. 246, § 1.

Under Massachusetts practice, the statutory requirements are strictly enforced. If the complaint includes a count for a cause of action in which trustee process is not available (e.g., slander), the entire attachment will be void, even though the complaint also contains a "trusteeable" cause of action *and* plaintiff waives the slander count. Buono v. Nardella, 344 Mass. 257, 259, 182 N.E.2d 142, 143-144 (1962). This is not regarded as discretionary; it may not be cured by amendment because the court "never had jurisdiction to entertain the action or to amend the [complaint]." A. Sandler Co. v. Portland Shoe Manufacturing Co., 291 Mass. 326, 327, 197 N.E. 1 (1935).

Similarly, if the action is one in which the bond requirement is statutorily waived, the statutory terms must be complied with exactly. Thus the statute exempts from the bond requirement "a writ which contains a statement that the action is ... for money due under a contract in writing," G.L. c. 246, § 1. A statement that the action is "an action of contract (in writing)" was held not to comply with the statute. Farber v. Lubin, 327 Mass. 128, 130, 97 N.E.2d 419, 420 (1951). The defect is jurisdictional, and cannot be cured by amendment. Tennessee Plastics, Inc. v. New England Elec. Heating Co., Inc., 345 Mass. 575, 577, 188 N.E.2d 569, 570-571 (1963). The court may allow an amendment only if the complaint states, however irrelevantly, one of the statutory exemptions. So long as the action is in fact based on *any* of the exceptions, the court may permit the necessary amendment. Tennessee Plastics, Inc. v. New England Electric Heating Co., Inc., *supra* at 577. 188 N.E.2d at 570-571.

Rules 15 (allowing liberal amendment) and 18 (allowing free joinder of claims) alter prior practice, and abrogate the strict rules heretofore laid down in interpreting G.L. c. 246, § 1.

Rule 4.2(b) prescribes the form of trustee process. It closely follows Rule 4(b), relying on Massachusetts Const.Pt. 2, c. 6, Art. V; G.L. c. 223, § 16.

Rule 4.2(c), covering service procedure, relates explicitly to the service of other process under Rule 4. Rule 4.2(c) requires service of the trustee process within 30 days after filing the complaint, i.e. within 30 days after commencement of the action. The problem did not arise under prior practice, because seizure had to precede entry; that is, in Massachusetts formerly an action (although commenced for statute of limitations purposes when the writ was filled out with the intention to serve, Rosenblatt v. Foley, 252 Mass. 188, 190, 147 N.E. 558, 559 (1925)), was not "in court" until the writ was entered and the declaration filed.

The principles of Rule 4.1(c), as discussed in the Reporters' Notes to that rule, apply to Rule 4.2(c).

Rule 4.2(d), by reference to "law," includes such statutory provisions as G.L. c. 246, §§ 10-19. The requirement of a signature under the penalties of perjury comes from G.L. c. 246, § 11. The 20-day requirement conforms to the general time-to-answer provision of the rules (Rule 12(a)); it enlarges the time formerly allowed by ten days (Supreme Judicial Court), G.L. c. 246, § 10.

Rule 4.2(e) makes trustee process available on claims against the plaintiff (counterclaims), or between parties on the same side of the *versus* (cross-claims), or against parties newly brought into the litigation by the defendant (third-party claims). Rule 4.2(e) eliminates venue requirements, G.L. c. 246, § 2, in any counterclaim situations, whether the counterclaim is compulsory or permissive, see Rule 13. If the counterclaim is *compulsory,* the defendant must raise it, or else abandon it forever, Rule 13(a). It would be unfair to allow venue rules to deprive such a defendant of the valuable right to trustee process. If the counterclaim is merely *permissive,* the unfairness argument does not apply. But the whole idea behind encouraging permissive counterclaims is the minimizing and compressing of litigation. That purpose seems clearly superior to the rationale behind the trustee venue statute, viz., the convenience of the trustee. This is particularly true under Rule 4.1(c), which contemplates that in the great majority of cases, the trustee will participate in the litigation entirely on paper. Even in those rare instances requiring "live" participation, no particular unfairness will result. In such a geographically compact state as Massachusetts, it does not seem unreasonable to require, say, a Boston bank to send a representative to testify in a Pittsfield lawsuit.

Rule 4.2(f) incorporates existing statutory law concerning plural service on the same trustee, G.L. c. 246, § 8. Such service, like fresh service on additional trustees, G.L. c.

246, § 8, requires appropriate court approval.

Rule 4.3: Arrest: Supplementary Process: Ne Exeat

(a) **Arrest; Availability of Remedy**. Except in cases of civil contempt or as specifically authorized by law, no civil arrest shall be permitted in connection with any action under these rules, except as provided in section (c) of this rule.

(b) **Supplementary Process**. Supplementary process shall be available in the form, manner, and to the extent provided by law.

(c) **Ne Exeat**. An order of arrest may be entered upon motion with or without notice when the plaintiff has obtained a judgment or order requiring the performance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt, and where the defendant is not a resident of the Commonwealth or is about to depart therefrom, by reason of which nonresidence or departure there is danger that such judgment or order will be rendered ineffectual. The motion shall be accompanied by an affidavit showing that the plaintiff is entitled to the relief requested. The court may fix such terms as are just, and shall in any event afford the defendant an opportunity to obtain his release by the giving of an appropriate bond. In this rule the words "plaintiff" and "defendant" mean respectively the party who has obtained the judgment or order and the person whose arrest is sought.

Effective July 1, 1974.

Reporter's Notes (1973): Rule 4.3 has no Federal counterpart. Massachusetts arrest procedure, to the extent that it is still viable, is governed by G.L. c. 224, §§ 1-30; the related subject of bail is covered by G.L. c. 226, §§ 1-25. There is serious question whether civil arrest, notwithstanding its ancient lineage, could survive a constitutional attack; cf. Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969).

Rule 4.3(a) thus eliminates arrest as a vehicle for the commencement of an action; arrest is still available, however, to enforce a judgment of contempt or to effectuate orders of court in the unusual circumstances covered by Rule 4.3(c).

Rule 4.3(b) refers to existing law, covering supplementary process. See G.L. c. 224, §§ 14-30. The subject is not appropriate for detailed treatment in the rules.

Rule 4.3(c) treats the writ of ne exeat regno, or ne exeat, ("let him not leave the realm") which is entirely the creature of "the common law and general equity jurisprudence." Cohen v. Cohen, 319 Mass. 31, 36, 64 N.E.2d 689, 692 (1946). It is designed to keep a defendant within the jurisdiction (by physical arrest, if necessary) so that the court's orders can continue to have effect. The writ " 'is regarded as little more than an order to

hold to equitable bail. The party may generally get rid of it by giving security to abide the event of the cause in litigation.' ... [It] operates in restraint of personal liberty. It is to be granted with caution. It is to be continued in force with caution." Cohen v. Cohen, supra at 37, 64 N.E.2d at 692-693. An order of arrest is available to assure compliance with any court order, *even an order obtained ex parte,* provided: (1) the original order or judgment was lawfully obtained; and (2) the court considering the application for the order of arrest is satisfied that justice demands issuance of that order. The requirements of proviso (2) will rarely be met; orders of arrest, therefore will ordinarily not be issued.

The last two sentences of Rule 4.3(c) are designed to prevent indiscriminate application for orders of arrest. Among the terms which a court might properly fix would be "a requirement that the plaintiff give bond to secure the defendant's damages and costs if the arrest proves unlawful or the defendant prevails on the merits." 1 Field, McKusick & Wroth, Maine Civil Practice 163 (1970).

Rule 5: Service and Filing of Pleadings and Other Papers

(a) **Service**: When Required. Except as otherwise provided in these Rules, or unless the court on motion with or without notice or of its own initiative otherwise orders, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery required to be served upon a party, every written motion other than one which may be heard ex parte, and every written notice, notice of change of attorney, appearance, demand, brief or memorandum of law, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on any party in default for failure to appear except that any pleading asserting new or additional claims for relief against him shall be served upon him in the manner provided for service of summons in Rule 4 and except as otherwise provided in Rule 55(b)(2) with regard to notice of a hearing on the amount of damages.

(b) **Same: How Made**. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) **Same: Multiple Defendants**. The court, on motion with or without notice or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) **Filing Generally, and Nonfiling of Discovery Materials**.

(1) Except as otherwise provided in Rule 5(d)(2), all papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter. Such filing by a party's attorney shall constitute a representation by him, subject to the obligations of Rule 11, that a copy of the paper has been or will be served upon each of the other parties as required by Rule 5(a). No further proof of service is required unless an adverse party raises a question of notice. In such event, prima facie proof of service shall be made out by a statement signed by the person making service, or by a written acknowledgment signed by the party or attorney served; and such statement or acknowledgment shall be filed within a reasonable time after notice has been questioned. Failure to make proof of service does not affect the validity of service.

(2) Unless the court, generally or in a specific case, on motion ex parte by any party or concerned citizen, or on its own motion shall otherwise order, the following shall not be presented or accepted for filing: notices of taking depositions, transcripts of depositions, interrogatories under Rule 33, answers and objections to interrogatories under Rule 33, requests under Rule 34, and responses to requests under Rule 34. The party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to court if needed or so ordered. Notwithstanding anything in this Rule 5(d)(2), any party pressing or opposing any motion or other application for relief may file any document pertinent thereto.

(e) **Filing With the Court Defined**. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that a judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(f) **Effect of Failure to File**. If any party fails within five days after service to file any paper required by this rule to be filed, the court on its own motion or the motion of any party may order the paper to be filed forthwith; if the order be not obeyed, it may order the paper to be regarded as stricken and its service to be of no effect.

(g) **Information Required**. On any pleading or other paper required or permitted by these rules to be filed with the court, there shall appear the name of the court and the county, the title of the

action, the docket number, the designation of the nature of the pleading or paper, and the name and address of the person or attorney filing it. In any case where an endorsement for costs is required, the name of any attorney of this Commonwealth appearing on the complaint filed with the court shall constitute such an endorsement in absence of any words used in connection therewith showing a different purpose.

Amended effective September 16, 1975; amended August 3, 1982, effective January 1, 1983; January 30, 1989, effective March 1, 1989. Amended March 5, 2002, effective May 1, 2002.

Reporter's Notes to Amendment to Rule 5(D) 2002: The 2002 amendment to Rule 5(d) added interrogatories under Rule 33 and answers and objections to interrogatories under Rule 33 to the listing of discovery materials that are not to be filed in court (unless leave of court is obtained). This amendment is intended to relieve the parties and court personnel of the burden of filing interrogatories and answers in court. Limitations on the filing of discovery documents were first added to Rule 5(d) in 1989, at which time the following documents were no longer to be filed: notices of taking and transcripts of depositions and requests and responses to requests under Rule 34.

In recent years, some courts have provided, by Standing Order or Administrative Directive, that interrogatories and answers to interrogatories not be filed, notwithstanding the express language of Rule 5(d). See Superior Court Administrative Directive No. 90-2, Housing Court Standing Order No. 1-96, District Court Standing Order No. 1-98 (applicable in Berkshire, Essex, Middlesex and Norfolk Counties). The 2002 amendment to Rule 5(d) has eliminated the conflict between the Massachusetts Rules of Civil Procedure and any such Standing Orders or Directives.

It should be noted that this amendment to the Massachusetts Rules of Civil Procedure does *not* change the requirement of Rule 7(a) of the Uniform Summary Process Rules (Trial Court Rule I) that discovery demands be served *and* filed in court (which results in an automatic postponement of the trial date pursuant to Uniform Summary Process Rule 7(b)). The Massachusetts Rules of Civil Procedure are applicable in summary process actions only if they are not inconsistent with the Uniform Summary Process Rules (see Uniform Summary Process Rule 1), and the provisions of the latter set of rules regarding filing of discovery are now inconsistent with Mass. R. Civ. P. 5(d).

Reporter's Notes (1996): With the merger of the District Court Rules into the Massachusetts Rules of Civil Procedure, differences that had existed in the District Court rules have been eliminated in merged Rule 5. District Court Rule 5(d) had required that papers after the complaint that are required to be served upon a party must be filed with the court either before service or within five days thereafter (as opposed to a reasonable period of time thereafter as set forth in the Rule 5 of the Mass.R.Civ.P.). Also, by merging the two sets of rules, the 1989 amendment to Mass.R.Civ.P. 5(d) regarding the non-filing of specified discovery materials is now clearly applicable in the District Court and Boston Municipal Court.

Reporter's Notes (1989): As a result of this amendment, which adds a subparagraph (2) to Rule 5(d), specified discovery documents shall ordinarily no longer "be presented or accepted for filing." The discovery documents that shall not be filed, except by leave of court, are: notices of taking and transcripts of depositions, and requests and responses to requests under Rule 34. However, in order to give the court access to relevant documents when a ruling is required, a party "pressing or opposing any motion or other application for relief may file any document pertinent thereto."

Interrogatories and answers thereto are not covered by this amendment, and must be filed in accordance with Rule 5(d)(1).*

The reasons for this amendment are that some courthouses have insufficient storage space, and the filing of discovery documents requires valuable clerical time. This amendment is largely patterned after Superior Court Department Standing Order No. 3-87 (Applicable to the Middlesex Division) entitled "SUBJECT: PAPERS IN CIVIL ACTIONS WHICH WILL NOT BE ACCEPTED FOR FILING." The United States District Court for the District of Massachusetts has a similar local rule entitled "Nonfiling of Discovery Materials." Local Rule 16(g).

There may not be a need for the new non-filing requirement in some counties or specific courthouses. The amendment permits a court to require filing "generally," thus authorizing a court to order the filing of all discovery, or categories of discovery, in all cases or in categories of cases. There may be occasions when a party, the press, or other concerned citizen has a good reason to have more discovery filed than is normally permitted under the amendment. Consequently, the amendment permits the court, "on motion ex parte by any party or concerned citizen, or on its own motion," to make a different order as to the filing of discovery either "generally or in a specific case."

* **Publisher's Note:** Superior Court Administrative Directive 90-2, effective December 3, 1990, provides "on a temporary basis and until further notice" for the non-filing of interrogatories and answers in offices of Superior Court Clerks.

Reporter's Notes (1983): Rule 5(a) has been amended by adding discovery documents to those which must be served upon each of the parties. Absent this provision, one must repeatedly consult the docket to keep abreast of the case and to ascertain whether further discovery is necessary. The Standing Advisory Committee considered the potential for large reproduction and mailing costs in multiple-party litigation; this can be controlled, however, by the court's authority to "otherwise order" which is already present in Rule 5(a). This amendment draws the Massachusetts Rule closer to Federal Rule 5(a).

Reporter's Notes (1973): Rule 5 regulates the service and filing of virtually every court document connected with a pending matter. Essentially, it requires that every party affected by a document receive appropriate notice at every step of the action after the original service of process. Obviously, the opposing party or his attorney is entitled to

receive a copy of the answer, and of any motion or other paper required to be served; the reference in Rule 5(a) to "similar paper" indicates that the list of other documents is not to be taken as exhaustive.

The phrase "except as otherwise provided" in Rule 5(a) refers to motions which may be made ex parte: (Rule 6(b)--request for enlargement of time made prior to expiration of the applicable period); (Rule 6(d)--application to hear a motion within 7 days); (Rule 65--application for a temporary restraining order); and (Rule 77(d)--requiring the clerk to give notice of the entry of all orders).

Parties in default for failure to appear need not be served, unless the paper in question contains a new or additional claim for relief; in such case, Rule 4 applies. Another exception to the blanket service requirement is any case involving numerous defendants in which the court has ordered a partial abrogation of such service (see Rule 5(c)).

Formerly in Massachusetts, although notice that a motion had been marked up for hearing had to be furnished to "all parties interested" a copy of the motion itself did not have to be supplied unless the opposing party demanded it. Of course, almost all attorneys routinely send copies of all papers to opposing counsel. Rule 5(a) will merely codify that salutary practice.

Rule 5(b) permits service to be made by delivering a copy to the attorney or party (if the party appears pro se), or by mailing one to him at his last known address; or if no such address is known, to the clerk of court. If a party has more than one attorney of record, service upon one of them suffices. Except for permitting service on the clerk in the rare case in which the address is unknown, this portion of Rule 5(b) works no substantial change in Massachusetts practice.

The concept of "delivery" is clearly set out in Rule 5(b). Prior Massachusetts practice did not precisely define this concept. The few cases which have considered the question suggest that the Massachusetts rule concerning delivery was more constrictive than Rule 5(b). For example, effective delivery under former Super.Ct. Rule 3 seemed to require personal receipt by the party or his attorney. Although the manner in which the paper reached the attorney or party was not essential, actual delivery was crucial. "The words 'delivering the same personally' as used in former Super.Ct. Rule 3 did not require the service in hand which is familiar in connection with a writ or process of the court. They were satisfied if the notice was caused to reach the party or his counsel in person." Checkoway v. Cashman Bros. Co., 305 Mass. 470, 472, 26 N.E.2d 374, 375 (1940). The individual giving the notice may use the post office for delivery, "if he is willing to take the chance that it will actually reach the opposing party or his counsel in person." Ibid.

Unlike Rule 5(b), which allows delivery by leaving the copy with a clerk or other person in charge of the recipient's office (or if the office is empty, by leaving the copy in a conspicuous place therein), Massachusetts strictly required personal delivery. In Foley v.

Talbot, 162 Mass. 462, 463, 39 N.E. 40 (1894), the attorney had left notice of filing a bill of exceptions in the office of opposing counsel. The Court held that a notice thus left was not duly served unless it actually reached its addressee.

Under Rule 5(b), service may be made by mailing the paper to the party or attorney at his last known address; if no address is known, the paper may be left with the clerk of court. Prior Massachusetts practice made no provision in cases where the address was unknown.

Notice must be written. In the absence of a waiver of written notice, an oral notice is void. Chertok v. Dix, 222 Mass. 226, 227, 110 N.E. 272 (1915). On the other hand, under Rule 5(b), notice by mailing is complete upon depositing the correctly-addressed, postage-prepaid notice in the mailbox. This conforms to previous practice. Checkoway v. Cashman Bros. Co., 305 Mass. 470, 471, 26 N.E.2d 374, 375 (1940); Blair v. Laflin, 127 Mass. 518, 521 (1879).

Rule 5(c) is a kind of "housekeeping" measure designed to enable the court to relieve parties of unnecessary paperwork and postage. This provision, which has no counterpart in prior Massachusetts law, will doubtless be construed by the courts in such a way as to alleviate the problem of excessive service, and not to create the worse difficulty of insufficient service.

The Supreme Judicial Court has held that under prior rules and statutes, filing must *precede* notice. In Arlington Trust Co. v. Le Vine, 289 Mass. 585, 586, 194 N.E. 725, 726 (1935), one attorney had prepared a bill of exceptions and sent them to his opponent with the following letter: "I am enclosing herewith copy of the Defendant's Bill of Exceptions in the above entitled matter, original of which I am this day filing with the Clerk of the Superior Court at Boston." The applicable statute, G.L. c. 231, § 113, and rule, Super.Ct. Rule 3, required that exceptions be reduced to writing and "notice thereof in writing shall be given to the adverse party." The Court held that the notice did not fulfill these requirements. (But see Curran v. Burkhardt, 310 Mass. 466, 468, 38 N.E.2d 622, 624 (1941); and note that S.J.C. Rule 2:28 requires only that copies be given "not later than the day of filing"). Rule 5(d) will relax the heretofore strict Massachusetts practice and will give the attorney the option of serving his opponent after filing, or a reasonable time before filing.

Federal Rule 5 makes no provision for proof of service of pleading and papers subsequent to the complaint (cf. Rule 4(d)); the matter is controlled by local rule in many Districts. Rule 5(d) has been expanded to eliminate all formalities as to proof of service of papers upon other parties. If an adverse party challenges the adequacy of notice, the serving party will of course have to prove service. In order to minimize frivolous challenges, Rule 5(d) provides that a simple statement signed under the penalties of perjury will suffice to establish prima facie proof of service: "I certify that on October 9, 1974, I served the within Answer on plaintiff by mailing a copy thereof, postage-prepaid,

directed to his attorney, John Adams, Esq., at his office, 78 Court Street, Boston, Massachusetts. Signed under the penalties of perjury."

The last sentence of Rule 5(d) is designed to make explicit that the attorney's failure to supply proper proof of service does not invalidate the service if in fact it has been properly completed.

Rule 5(e) has no specific Massachusetts analogue, although various statutes and rules indicate strongly that filing must take place at the clerk's office. See, e.g., G.L. c. 231, §§ 13, 113; Super.Ct. Rule 73. The portion of Rule 5(e) permitting service with the judge is new to Massachusetts. It is designed to cover that rare circumstance in which a party's ability to obtain immediately necessary relief might be unjustly impeded were he required first to file his paper with the clerk.

Rule 5(f) makes clear that the court, either of its own motion, or on application from the adverse party, has power to compel filing of papers; such power necessarily requires an appropriate sanction, in this case, nullifying the service and the papers themselves.

The "backing" requirement of Rule 5(g) codifies familiar Massachusetts practice. The reference to endorsement for costs deals with the requirement of G.L. c. 231, §§ 42 and 43 that initial papers must, if the plaintiff is not an inhabitant of the Commonwealth, be endorsed before entry by a "responsible" inhabitant, who then becomes liable for costs if the plaintiff is unable or unwilling to pay them. This requirement does not affect the large majority of cases, in which the plaintiff is a resident. Shute v. Bills, 198 Mass. 544, 545, 84 N.E. 862, 863 (1908). An endorsement from the office of an attorney is a sufficient compliance with the statute; the attorney thus becomes liable for the costs. Johnson v. Sprague, 183 Mass. 102, 104, 66 N.E. 422, 423 (1903). Rule 5(g) merely clarifies existing law and clearly implies that if the attorney does not wish to be liable for costs, he may so indicate on the backer of the complaint. In that case, the plaintiff must find someone else to endorse the backer.

Rule 6: Time

(a) **Computation**. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute or rule, 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 so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a 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 and in Rule 77(c), "legal holiday" includes those days specified in Mass. G.L. c. 4, § 7 and 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.

(b) **Enlargement**. When by these rules or by a notice given thereunder or by order or rule of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; or (3) permit the act to be done by stipulation of the parties; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d), and (e), and 60(b), except to the extent and under the conditions stated in them.

(c) **For Motions-Affidavits**. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 7 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(d) **Additional Time After Service by Mail**. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other papers upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

Effective July 1, 1974.

Reporter's Notes (1996): Prior to the merger of the District Court Rules into the Massachusetts Rules of Civil Procedure, the District Court version of Rule 6(b) contained no reference to Rule 50(b) regarding motions for judgment notwithstanding the verdict. This difference has been eliminated in the merged set of rules.

Reporter's Notes (1973): Rule 6(a) does not significantly alter Massachusetts law. G.L. c. 4, § 9 provides:

"Except as otherwise provided, when the day or the last day of the performance of any act, including the making of any payment or tender of payment, authorized or required by statute or by contract, falls on Sunday or a legal holiday, the act may, unless it is specifically authorized or required to be performed on Sunday or on a legal holiday, be performed on the next succeeding business day."

At the common law, if the limited time was less than a week, Sundays were excluded in calculating the time. Cunningham v. Mahan, 112 Mass. 58 (1873); Stevenson v. Donnelly, 221 Mass. 161, 108 N.E. 926 (1915). If however, the time limit exceeded one

week, Sundays were included in the calculation of the time, even where the last day for doing the act fell on a Sunday. Haley v. Young, 134 Mass. 364 (1883).

Rule 6(a) liberalizes the common law, excluding not only Sundays but Saturdays and legal holidays as well, and slightly liberalizes G.L. c. 4, § 9 by excluding all Saturdays.

G.L. c. 4, § 9 extends the expiration date of a statute of limitations from a Sunday to the following Monday. See Smith v. Pasqualetto, 246 F.2d 765 (1st Cir.1957). Federal Rule 6(a) has been held to extend a federal statute of limitations where the last day fell on a Sunday. See Rutledge v. Sinclair Refining Co., 13 F.R.D. 477 (S.D.N.Y.1953).

With certain exceptions, Rule 6(b) permits the court to extend the time for doing acts required under the Rules. The exceptions are governed by the language of the specific applicable rules:

50(b)--a motion for judgment notwithstanding the verdict;

52(b)--motion to amend findings;

59(b)--motion for a new trial;

59(d)--new trial on court's initiative;

59(e)--motion to alter or amend a judgment;

60(b)--a motion for relief from a judgment.

Rule 6(b) applies: (a) where the time period has already expired, as well as (b) where the time period has not expired, although in the *former* situation the failure to act within the time period must have been the result of excusable neglect.

Rule 6(b) does not change Massachusetts practice. The power of the courts in Massachusetts to allow extension of time applies also to permission for late filing. See Whitney v. Hunt-Spiller Mfg. Corp., 218 Mass. 318, 105 N.E. 1054 (1914); Prunier v. Schulman, 261 Mass. 417, 158 N.E. 785 (1927); Hill v. Trustees of Glenwood Cemetery, 323 Mass. 388, 82 N.E.2d 238 (1948).

Federal Rule 6(c) was rescinded in 1966 and is not included in Rule 6. Rules 6(c) and 6(d) are the same as Federal Rules 6(d) and 6(e). They do not substantially affect prior law.

Rule 7: Pleadings Allowed: Form of Motions

(a) **Pleadings**. There shall be a complaint and (except as provided by law) an answer, and a trustee's answer under oath if trustee process is used; a reply to a counterclaim denominated as such, an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that

the court may order a reply to an answer or a third-party answer. In the Land Court, answers in actions for registration, confirmation, or tax foreclosure shall conform to G.L. c. 185, § 41, and G.L. c. 60, § 68, where applicable.

(b) **Motions and Other Papers**.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) **Demurrers, Pleas, etc., Abolished**. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Amended December 13, 1981, effective January 1, 1982.

Reporter's Notes (1973): Rule 7 is virtually identical to Federal Rule 7, although Rule 7(a) includes as a permissible pleading, a trustee's answer under oath if trustee process is used. Rule 7 reflects the belief that extensive and complex pleadings are not desirable as a vehicle for the narrowing of issues in a case and that this function can be better performed by discovery and the use of the pretrial conference.

Except where there is a counterclaim, cross-claim or third-party complaint, the only pleadings allowed are the complaint and answer, although the court may order a reply to an answer. In federal practice such orders are rare, because of the availability of other devices, such as discovery, for narrowing the issues. See Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co., 10 F.R.D. 39, 41 (S.D.N.Y.1950). Absent an order, a reply is not permissible. Where no reply to an answer is required, allegations in the answer are deemed denied or avoided. See Rule 8(d). Thus in the usual case, the only pleadings will be the complaint and the answer. Any deficiencies in the pleadings which presently are attacked by such devices as demurrers, pleas, answers in abatement, and the like will be raised by motion or answer.

The limitation of pleadings subsequent to the answer does not substantially alter Massachusetts practice.

Rule 7(a) provides also for an answer to a cross-claim; a third-party answer, if a thirty-party complaint is served; and a reply to a counterclaim *denominated as such*.

The italicized language relieves the plaintiff from deciding at his peril whether the defendant's pleading constitutes a counterclaim, since failure to reply to a properly denominated counterclaim has the effect of admitting its allegations. (See, however, Rule 6(b), which permits the Court in its discretion upon a showing of excusable neglect to provide relief from the consequences of failure to file a reply within the twenty-day period specified by Rule 12(a)(1).)

If an answer contains a counterclaim which is not so labeled the plaintiff is not required to reply. In fact, theoretically, he is not entitled to reply. However, under Rule 8(c), the Court on terms, if justice so requires, shall treat the pleading as having been so denominated and thus allow a reply. Where the defendant denominates as a counterclaim what is actually a defense the cautious lawyer will no doubt reply.

The plaintiff's reply to a properly designated counterclaim should only relate to matters in the counterclaim and should not traverse allegations of the answer which are not part of the counterclaim.

Under Rule 7(c), demurrers, pleas, and exceptions for insufficiency of a pleading are abolished. The functions of these various devices are served under the rules by either motion or answer. See Rule 12(b).

Rule 8: General Rules of Pleading

(a) **Claims for Relief**. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) **Defenses: Form of Denials**. A party shall state in short and plain terms his defenses to such claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11. The signature to an instrument set forth in any pleading shall be taken as admitted unless a party specifically denies its genuineness. An allegation in any pleading that a place is a public way shall be taken as admitted unless a party specifically denies such allegation.

(c) **Affirmative Defenses**. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow

servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) **Effect of Failure to Deny**. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) **Pleading to Be Concise and Direct; Consistency**.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) **Construction of Pleadings**. All pleadings shall be so construed as to do substantial justice.

Effective July 1, 1974.

Reporter's Notes (1973): Rule 8(a), unlike Federal Rule 8(a)(1), does not contain requirement that the claim set forth "a short and plain statement of the grounds upon which the court's jurisdiction depends." Such a statement, although essential in the federal courts, is of minimal value in the state courts.

Rule 8(b) provides that the signature to an instrument set forth in any pleading shall be taken as admitted unless a party specifically denies its genuineness. The only Massachusetts statutes dealing with this point, G.L. c. 231, § 29 and G.L. c. 106, § 3-307, reach the same result. To comport with prior law, Rule 8(b) also includes a provision that an allegation in any pleading that a place is a public way shall be taken as admitted unless a party specifically denies such allegation.

That part of former G.L. c. 231, § 30 concerning an allegation that a party is an executor, administrator, guardian, trustee, assignee, conservator, receiver or corporation, was not included in Rule 8(b) because this matter is adequately covered in Rule 9(a). While Rule 9(a) deals only with the matter of capacity of a party to sue or be sued, whereas the language of G.L. c. 231, § 30 could reasonably be interpreted to deal with the matter of capacity of a party for other purposes, these latter instances are so rare that they do not warrant specific mention in Rule 8(b).

G.L. c. 231, § 85A imposes upon the defendant-registered owner of an automobile involved in a collision the responsibility for setting up as an affirmative defense in his answer a denial that the automobile was being operated by a person for whose conduct the defendant was legally responsible. This requirement was omitted from Rule 8(b) for several reasons:

(1) Unlike the questions of the genuineness of a signature or the public ownership of a place, which are susceptible of definite answers and will not often be denied, the legal relationship between the registered owner of a motor vehicle and its operator will often call for a conclusion upon which reasonable minds may differ. When there is any good faith doubt on the matter, the allegation will be denied by the defendant, and properly so.

(2) G.L. c. 231, §§ 85B and 85C are intertwined with the provisions of § 85A. Any subsequent statutory amendments to G.L. c. 231, §§ 85A, 85B, and 85C would likely entail a revision of the rule.

(3) Since one of the major purposes of Rule 8(b) is elimination of the general denial except in those rare cases where the pleader intends in good faith to controvert all the averments of the preceding pleading, particularization of specific situations requiring a specific denial tends to weaken the emphasis on this goal.

Rule 8 reflects the view that the primary function of pleadings is not to formulate the precise issues for trial but rather to give fair notice of the claims and defenses of the parties. Particularized pleadings do occasionally expose the plaintiff's lack of a viable case or the defendant's lack of a valid defense. More often, however, particularized pleadings merely result in wasted time and effort, because the claimed defects are matters of form which are subsequently corrected by amendment. In the occasional case where the plaintiff does not have a valid claim, a trial can still be avoided by the use of discovery and either a motion to dismiss for failure to state a claim upon which relief can be granted (Rule 12(b)(6)), or a motion for summary judgment. (Rule 56).

Rule 8(a)(1) provides that a pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief alters prior practice."

G.L. c. 231, § 7 provides in part:

"Second, the declaration shall state concisely and with substantial certainty the substantive facts necessary to constitute the cause of action."

The change is epitomized by the statutory terms "substantive facts" and "cause of action". Under prior law, a pleading had to state precise facts rather than general conclusions, Becker v. Calnan, 313 Mass. 625, 630, 48 N.E.2d 668, 671 (1943), and the substantive allegations had to set forth the essential elements of a recognized cause of action. Brighams Cafe Inc. v. Price Bros. Co., 334 Mass. 708, 137 N.E.2d 923 (1957).

Rule 8(a)(1) makes no reference to facts or causes of action. Under this rule, if a plaintiff fairly notifies the defendant of the nature of the plaintiff's claim and the grounds on which he relies, the action should not be dismissed because it does so through what might be termed "conclusions of law." See Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 101, 2 L.Ed.2d 80 (1957). Certain statutes pertaining to real estate may, however, require unique particularity. See G.L. c. 185, §§ 28, 29; c. 237, § 3; c. 240, § 1.

While Rule 8(a)(1) allows the pleading of conclusions, Rule 12(e) (motion for more definite statement) and Rule 12(f) (motion to strike) cure the only real impropriety of the pleading of conclusions, namely, that the pleading is too vague to form a responsive pleading. It should be emphasized that Rule 8(a)(1) does not alter the statutory requirements regarding the omission of names in Superior Court divorce proceedings, G.L. c. 208, § 10.

Rule 8(a)(2) provides that the claim contain a demand for judgment for the relief to which the pleader deems himself entitled. This will control in the event of a default judgment, see Rule 54(c). It is also important in shaping the judgment, see Rule 54(c) and in determining whether a jury trial is warranted.

Unlike prior procedure, Rule 8(a)(2) permits the pleader to seek in his claim both legal and equitable relief, either together or in the alternative.

Behind Rule 8(b) lies the simple principle that a defendant's answer should unmistakably indicate to both Court and plaintiff precisely which aspects of the complaint are admitted, and which are controverted. Accordingly, the answer must serially respond to each paragraph of the complaint (with an exception to be discussed shortly). Only three responses are proper: (1) an admission of the allegations of the paragraph; (2) a denial of those allegations; or (3) a disclaimer of knowledge or information sufficient to form a belief as to the truth of those allegations. The provisions of Rule 15 are available to relieve the defendant of the consequences of any admission subsequently discovered to be incorrect. The strictures of Rule 11 apply to encourage admission of those allegations which defendant knows to be true, even if without such admission, plaintiff would be put to expense or difficulty in proving them, or might even be unable to prove them at all. See Arena v. Luckenbach Steamship Company, 279 F.2d 186, 188-189 (1st Cir.1960), cert. denied, 364 U.S. 895, 81 S.Ct. 222, 5 L.Ed.2d 189 (1960): "It is difficult to believe that counsel who signed this answer had good grounds to assert, among other things, that his client did not either own, operate, or manage the vessel, that the plaintiff was not employed by the stevedore, and that he was not injured, or even aboard the vessel. It is a breach of counsel's obligation to the court to file an answer creating issues that counsel does not affirmatively believe have a basis."

Rule 8(b) thus proscribes promiscuous use of the general denial except in those rare cases where defendant (and, more important, his attorney) in good faith denies each and every allegation in the complaint. In this respect, it differs from G.L. c. 231, § 22, which

permitted “the general issue” in real and mixed actions. However, G.L. c. 231, § 25, required a separate denial “in clear and precise terms” of each “substantive fact intended to be denied”, or a declaration of ignorance (cognate under Rule 8(b) to a disclaimer of knowledge or information).

If instead of denying the plaintiff's assertions (or in addition to denying them, see Rule 8(e)(2)), the defendant wishes only to controvert their effect, he may do so by the modern equivalent of the old “confession and avoidance.” Under Rule 8(c) such disputation is called an affirmative defense; the Rule requires the defendant to set forth any and all affirmative defenses, including, as under prior law, “any facts which would entitle him in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action or against a judgment recovered by the plaintiff in such action,” G.L. c. 231, § 31.

It does not, however, seek to regulate the substantive question of distribution of the burden of producing evidence or of persuading the trier of fact. The rule merely establishes the burden of pleading, i.e., of raising the issue. On the other hand, by raising for the first time an issue on which he does not have the burden of production or persuasion, a defendant may conceivably run afoul of the doctrine of “invited error.” This principle, which so far as the Reporters can determine has not yet been enunciated by the Massachusetts Court, holds that if a defendant alleges a fact, he cannot be heard to complain if the trial court charges the jury that the defendant has assumed the burden of proving that fact. The Reporters agree with Professor Moore, 2A Moore, Federal Practice, § 8.27[2], that the mere raising of the defense should not shift any burden to the defendant; they recommend this position unequivocally.

A somewhat related point concerns the possible working of an estoppel on the defendant who pleads, first, a denial of all operative allegations, then an affirmative defense. Under prior Massachusetts practice, Payson v. Macomber, 85 Mass. 69, 73 (1861), as well as under the Federal Rules, such estoppel is of doubtful validity; nonetheless cautious counsel for defendants will probably wish to preface affirmative defenses with some such language as: “If plaintiff suffered injury, as in his complaint is alleged, which is denied. . . .”

In raising an affirmative defense, whoever may be obliged to assume the burden of production and persuasion, the defendant need only give the plaintiff “fair notice,” 2A Moore, Federal Practice § 8.27[3]. This is of course the natural corollary of the notice-pleading theory behind the Rules generally and Rule 8(a) in particular.

Rule 8(d) sets up a straightforward way of dealing with failure to deny averments:

(1) If the averments are contained in a pleading to which a responsive pleading is authorized, the pleader must either utilize the opportunity or be taken to have waived it. Rule 8(d) makes the admission automatic.

(2) If the averments are contained in a pleading to which responsive pleading is not authorized, all averments are automatically taken to have been denied. The chief subject of this Rule will be the answer, see Rule 7(a), unless the court orders a reply.

Rule 8(e)(1) merely emphasizes the fact that under Rule 8 no technical forms of pleading are required.

Rule 8(e)(2) permits a party to state as many separate claims or defenses as he has, regardless of consistency and whether based on legal or equitable grounds. This changes prior Massachusetts practice.

Under previous Massachusetts law, besides being unable to join legal and equitable claims in one pleading, a plaintiff could not join causes of action unless they arose out of the same matter (G.L. c. 231, § 1A) or unless they belonged to the same division of actions. (G.L. c. 231, § 7 Fifth and Sixth); Twombly v. Monroe, 136 Mass. 464 (1884); Vigoda v. Barton, 338 Mass. 302, 155 N.E.2d 409 (1959). In equity practice, a bill would be objectionable as multifarious if separate and distinct wrongs, each dependent upon its own facts, were joined in a bill. Coughlin v. Coughlin, 312 Mass. 452, 456, 45 N.E.2d 388, 391 (1942).

Rule 8(e)(2) also permits a party to set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. To some extent this rule changes Massachusetts practice, which permitted different causes of action to be joined (with the exceptions mentioned previously), so long as the causes of action were stated in different counts. See G.L. c. 231, § 7 Fifth, Sixth. See also Davis v. H.S. & M.W. Snyder, Inc., 252 Mass. 29, 143 N.E. 319 (1925); McNulty v. Whitney, 273 Mass. 494, 174 N.E. 121 (1931). Because Rule 8(e)(2) permits the plaintiff to set forth two or more statements of a claim in one count, the rule that allegations in one count will not be read into the allegations of another count, Kenney v. Boston & Maine R. R., 301 Mass. 271, 274, 17 N.E.2d 103, 104 (1938) is eliminated.

A party's right under Rule 8(e)(2) to state claims based upon inconsistent remedies does not alter Massachusetts practice, see G.L. c. 231, § 7 (Sixth) (providing that a plaintiff shall not be required to elect between causes of action where the remedies are inconsistent). Obviously, separate judgments, based upon inconsistent theories, against the same person for the same acts, cannot be outstanding simultaneously. See Rock-Ola Mfg. Corp. v. Music & Television Corp., 339 Mass. 416, 425, 426, 159 N.E.2d 417, 419 (1959).

Rule 8(e)(2) changes practice with respect to defenses. Heretofore, at law different *consistent* defenses could be separately stated in the same answer or plea. See Payson v. Macomber, 85 Mass. 69, 73 (1861). In equity, however, an answer could state as many defenses, in the alternative, regardless of consistency, as the defendant deemed essential

to his defense. See S.J.C. Rule 2:12. Rule 8(e)(2) makes the equity principle applicable to all cases.

Rule 8(f) alters the prior Massachusetts rule that pleadings must be construed most strictly against the party drafting them. Hawes v. Ryder, 100 Mass. 216, 218 (1868).

The difference between the philosophy of Rule 8 and that of former Massachusetts pleading practice emerges vividly from a comparison of the "substantial justice" construction requirement of Rule 8(f) with G.L. c. 231, § 38: "The allegations and denials of each party shall be so construed by the court as to secure as far as possible substantial precision and certainty."

Rule 9: Pleading Special Matters

(a) **Capacity**. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) **Fraud, Mistake, Duress, Undue Influence, Condition of the Mind.** In all averments of fraud, mistake, duress or undue influence, the circumstances constituting fraud, mistake, duress or undue influence shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) **Conditions Precedent**. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) **Official Document or Act**. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) **Judgment**. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) **Time and Place**. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) **Special Damage**. When items of special damage are claimed, they shall be specifically stated.

Effective July 1, 1974.

Reporter's Notes (1973): Rule 9 is substantially the same as Federal Rule 9 and does not substantially alter Massachusetts practice.

Rule 9(a), which abolishes any requirement that the pleadings aver the legal existence of a party or the capacity or authority of a party to sue or be sued, is based upon the assumption that in most cases the capacity, authority or legal existence of a party is not in issue; thus the pleadings should not be cluttered with unnecessary verbiage. Of course, the caption of the complaint would contain the capacity of the parties in the action. Thus, for example, the name of the plaintiff appearing in the complaint, "Alpha Corporation," would indicate that the plaintiff is a corporation. Under Rule 9(a), however, the complaint would not have to recite the fact of incorporation or indicate the state of incorporation. Likewise, while the caption of the complaint would name the plaintiff as "John Jones, Executor under the will of Mary Smith," it would not be necessary to recite in the complaint the fact of the appointment.

Most of the Massachusetts cases dealing with the capacity of a party to sue or be sued have involved the application of G.L. c. 231, § 30 which provides in part:

"If it is alleged in any civil action or proceeding that a party is an executor, administrator, guardian, trustee, assignee, conservator or receiver or is a corporation ... such allegation shall be taken as admitted unless the party controverting it files in court, within the time allowed for the answer thereto, or within ten days after the filing of the paper containing such allegation, or within such further time as the court may allow on motion and notice, a special demand for its proof."

For cases applying this statute see Boudreau v. New England Transportation Co., 315 Mass. 423, 53 N.E.2d 92 (1944) (administrator); Salvato v. Di Silva Transportation Co., 329 Mass. 305, 108 N.E.2d 51 (1953) (corporation); Schwartz v. Abbot Motors, Inc., 344 Mass. 28, 181 N.E.2d 334 (1962) (trustees under a declaration of trust and assignees).

Like prior law, Rule 9(a) places on the party disputing capacity, authority or legal existence the initial burden of controverting it.

Massachusetts cases hold that, unless the lack of capacity appears on the face of the pleadings, the question of alleging lack of capacity to sue or be sued is a matter in abatement. See Friedenwald Co. v. Warren, 195 Mass. 432, 434, 81 N.E. 207 (1907). If the lack of capacity to sue or be sued appears on the face of the pleading, a motion to dismiss is the proper procedure. Tyler v. Boot and Shoe Workers' Union, 285 Mass. 54, 188 N.E. 509 (1933).

The federal cases have held that where lack of capacity appears on the face of the pleadings it may be raised by a motion to dismiss. Klebanow v. New York Produce Exchange, 344 F.2d 294, 296, fn. 1 (2d Cir.1965); Hershel California Fruit Products Co., Inc. v. Hunt Foods Inc., 119 F.Supp. 603, 607 (D.C.Cal.1954); Coburn v. Coleman, 75 F.Supp. 107, 109 (D.C.S.C.1947).

Rule 9(b) does not alter Massachusetts law, which has long held that averments of fraud must be stated with particularity, Nichols v. Rogers, 139 Mass. 146, 29 N.E. 377 (1885);

Cohen v. Santoianni, 330 Mass. 187, 112 N.E.2d 267 (1953), and that allegations of duress must be similarly stated, Fleming v. Dane, 298 Mass. 216, 10 N.E.2d 85 (1937).

That part of Rule 9(b) permitting a general averment with respect to malice, intent and knowledge and other conditions of a person's mind also comports with prior law. See Gabriel v. Borowy, 326 Mass. 667, 672, 96 N.E.2d 243, 245 (1951).

Because under former practice, allegations of duress had to be stated with particularity (see Fleming v. Dane, supra) the reasons for the requirement that fraud and mistake be stated with particularity also apply to duress and undue influence, which Rule 9(b) specifically includes.

Rule 9(c) does constitute a change in prior Massachusetts law. G.L. c. 231, § 7 provided in part:

"Twelfth, The condition of a bond or other conditional obligation, contract or grant declared on shall be set forth. The breaches relied on shall be assigned, and the performance of conditions precedent to the right of the plaintiff to maintain his action shall be averred or his reason for the nonperformance thereof stated."

The failure of the plaintiff to allege the performance of conditions precedent to the right of the plaintiff to maintain his action was held sufficient grounds to sustain the defendant's demurrer. Mirachnick v. Kaplan, 294 Mass. 208, 1 N.E.2d 40 (1936); Muchnick v. Bay State Harness Horse Racing & Breeding Association, Inc., 341 Mass. 578, 171 N.E.2d 163 (1961). An allegation that "the plaintiff has done and performed all things on its part in said agreement contained to be done and performed, and that it has kept all of the conditions of said agreement" has been held insufficient to avoid a demurrer. In Newton Rubber Works v. Graham, 171 Mass. 352, 353, 50 N.E. 547, 548-549 (1898), the Court held that the conditions should also be set out.

Rule 9(d) and (e) require little comment. While some common law authority holds that the jurisdiction of the court rendering a foreign judgment must be pleaded, no Massachusetts decision directly so states. In Upham v. Damon, 94 Mass. (12 Allen) 98 (1866), an action on a judgment rendered by a magistrate of another state, the Court held that an objection by the defendant that the declaration did not show that the magistrate had jurisdiction can only be taken by demurrer. "We have not therefore considered whether, if so taken [it] would have availed the defendant" Id. at 99. The presumption in favor of the regularity and validity of a judgment rendered by a court of general and superior jurisdiction of another state, Tuells v. Flint, 283 Mass. 106, 186 N.E. 222 (1933), while concerned with the matter of proof, may have some bearing on the pleading issue.

It should be noted that Rule 9(e) makes no distinction between domestic and foreign judgments.

Rule 9(f) makes averments of time and place material for purposes of testing the sufficiency of the complaint. This alters the common law rule that time and place in most

instances are not material. Shipman, Common Law Pleading, 458-460 (1923). See Pierce v. Pickens, 16 Mass. 470 (1820); Folger v. Fields, 66 Mass. 93 (1853).

It should be noted that Rule 9(f) does not require specificity in pleading time and place. See Supreme Wine Co. v. Distributors of New England, Inc., 198 F.Supp. 318 (D.Mass.1961). Rule 9(f) provides only that when specific allegations of time and place are made, they are material, that is they must be able to withstand a motion under Rule 12. Any defect can be cured by amendment under Rule 15.

The chief importance of Rule 9(f) lies in connection with the statute of limitations. Under prior law the defense of the statute of limitations, even though apparent from the face of the declaration, had to be set up as an affirmative defense not by demurrer. Aisenberg v. Royal Insurance Co. Ltd., 266 Mass. 543, 165 N.E. 682 (1929). Because time is material under Rule 9(f), a motion to dismiss under Rule 12(b)(6) may be utilized whenever the time alleged in the complaint shows that the cause of action has not been brought within the statutory period.

Rule 9(g) states prior law, Antokol v. Barber, 248 Mass. 393, 143 N.E. 350 (1924), and does not purport to determine what precisely are special damages. Prior law will govern this.

The justification for Rule 9(g) and prior law is that the defendant ought to be guarded against surprise at the trial by evidence tending to prove damages of which he had no previous notice and which would not normally be implied from the facts set forth in the complaint.

The words "special damage" in Rule 9(g) have three appropriate meanings:

1. Special damages are sometimes considered "damages not necessarily flowing from the acts set out in the declaration, and of which the defendant could not be supposed to have notice unless they were properly averred." Baldwin v. Western Railroad Corp., 4 Gray 333, 336 (1855). Special damages "are not implied by law" from allegation of general damages "because they do not necessarily arise from the act complained of." Id. Thus, in an action for injury to real estate, damages for the loss of rent may not be recovered unless they are specially pleaded. Parker v. City of Lowell, 11 Gray 353, 358 (1858). These are to be contrasted with general damages; "all damages which are the natural or necessary consequences of the cause of action." "Damages such as the law will imply from the facts set forth in the declaration." Antokol v. Barber, 248 Mass. 393, 395, 143 N.E. 350, 351 (1924). Thus, in a case involving an automobile accident, both the expense of repairing the vehicle and the fair value of its use while being repaired were considered elements of general damages, Id., because they were "such damages as any other person as well as the plaintiff, might under the circumstances have sustained from the acts set out in the declaration." Baldwin v. Western Railroad Corp., 4 Gray 333 (1855).

2. In an action for slander, unless the words alleged are "slanderous per se", the plaintiff, in order to withstand a motion under Rule 12(b)(6) (failure to state a claim upon which relief can be granted) must allege special damage, i.e. particular allegations of the way the plaintiff has suffered money damages from the defendant's words. Lynch v. Lyons, 303 Mass. 116, 119, 20 N.E.2d 953, 955 (1939).

3. In personal-injury litigation the words "special damages" (or more colloquially, "specials") refer to such specific, allocable items of damage as the plaintiff's loss of earning capacity, his hospital and medical bills, and any other out-of-pocket losses, although arguably, some of these items might be considered general damages under the principles discussed earlier. For example, Millmore v. Boston Elevated Railroad, 198 Mass. 370, 84 N.E. 468 (1908) held that a housewife's claim for impairment of earning capacity caused by personal injury constituted general damages and not special damages.

Under prior Massachusetts practice (Super.Ct.Rule 33A) the plaintiff was required to file "a statement setting forth the facts in full and itemized detail upon which the plaintiff then relies as constituting the damages." Rule 9(g) makes no more stringent requirement.

Under Federal Practice, Rule 9(g) has been interpreted to require a plaintiff "to inform defending parties as to the nature of the damages claimed in order to avoid surprise; and to inform the court of the substance of the complaint." Great American Indemnity Co. v. Brown, 307 F.2d 306, 308 (5th Cir.1962). Thus, for example, Form 9, which is by definition sufficient under the rules (Rule 84), contains no other reference to damages, general or special, than the following: "As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars."

Rule 9(g) has been interpreted to place upon the *defendant* the onus of requiring strict compliance. Faced with a complaint which he believes to contain inadequate notice of special damages, a defendant "should file a motion for a more definite statement" under Rule 12(e), Great American Indemnity Co. v. Brown, 307 F.2d 306, 308 (5th Cir.1962). Defendant's failure to raise this point in the pleadings stage constitutes a waiver of the requirements. Niedland v. United States, 338 F.2d 254, 259 (3rd Cir.1964).

Rule 10: Form of Pleadings

(a) **Caption; Names of Parties**. Every pleading shall contain a caption setting forth the name of the court, the county, the title of the action, the docket number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other

pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) **Paragraphs; Separate Statements**. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by Reference; Exhibits**. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

(d) **Parties' Residence or Place of Business**. The complaint, and any subsequent pleading stating a claim against a person not originally a party to the action, shall state the respective residences or usual places of business of the party stating a claim and of each person against whom a claim is stated, if known to the pleader; if unknown, the complaint or pleading shall so state.

(e) **Two-Sided Documents**. The text of any document may appear on both sides of the page.

Amended December 14, 1976, effective January 1, 1977; March 5, 2010, effective May 1, 2010.

Reporter's Notes (2010). Rule 10(e) was added in 2010 to recognize the existing practice by which some attorneys include text on both the front and back of a page. The language of Rule 10(e) is similar to a 1999 amendment to Appellate Rule 20(a)(4) regarding briefs and other documents filed in the appellate courts.

Although the two-sided document language has been added to Rule 10, which governs the form of pleadings, the provisions of Rule 10, including the two-sided document language, are also applicable to motions and other papers filed under the Massachusetts Rules of Civil Procedure. See Rule 7(b)(2).

Reporter's Notes (1973): Rule 10(a) works no substantial change in Massachusetts practice except for requiring that the county be stated in the caption, and that "file" be changed to "docket."

Prior law required that actions be divided into "divisions of personal actions", viz. contract, tort, and replevin. G.L. c. 231, § 1. Causes of action for tort and contract could be joined in a single declaration, provided they derived from the same subject matter, G.L. c. 231, § 7. By statute, a declaration could "contain any number of counts for different causes of action in the same division of action." G.L. c. 231, § 7. The word "count" in Massachusetts thus signified a statement of a complete and independent cause of action.

Rule 10(b) changes prior law. The word "count" no longer carries any talismanic significance. Under Rule 10 the pleader must utilize an additional count only when such use will facilitate clear exposition of the contents of the pleadings. Further, the concept of division of actions is no longer relevant. By Rule 8(e)(2), the pleader is entitled to state "as many separate claims ... as he has regardless of consistency and whether based on legal or equitable grounds."

Rule 10(c) aims to reduce the size of pleadings. Incorporating other parts of the pleading by reference will eliminate the need for repetition. Making a copy of a written instrument annexed to a pleading a part of the pleading for all purposes will likewise simplify proceedings. It should be noted that Rule 10(c) does not purport to require that any document be made part of any particular pleading. The option remains with the pleader, as it did under earlier law, G.L. c. 231, § 7, G.L. c. 231, § 147(10), whether (1) to annex a copy of the document to the pleading; or (2) merely to rely on appropriate stating language in the body of the pleading.

Rule 10(c) abrogates that portion of G.L. c. 231, § 7 which permitted the court, upon motion of the defendant, to require the plaintiff to set out a copy of the original of the contract sued on. The net effect, however, will be the same. A defendant may, under appropriate discovery provisions, compel production by the plaintiff of the contract (or a copy); by deposition or interrogatories, he may, if the instrument is lost or destroyed, discover the particulars of the loss or destruction.

Actions on promissory notes or accounts will continue in substantially the present form. The approved forms for such actions generally follow prior Massachusetts practice. The note or account is either set out in the complaint or annexed thereto as an exhibit (and incorporated by reference), see Forms 3 and 4.

Rule 10: Form of Pleadings

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the county, the title of the action, the docket number, and a designation as in Rule 7(a) . In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

(d) Parties' Residence or Place of Business. The complaint, and any subsequent pleading stating a claim against a person not originally a party to the action, shall state the respective residences or usual places of business of the party stating a claim and of each person against whom a claim is stated, if known to the pleader; if unknown, the complaint or pleading shall so state.

(e) Two-Sided Documents. The text of any document may appear on both sides of the page.

Amended December 14, 1976, effective January 1, 1977; March 5, 2010, effective May 1, 2010.

Reporter's Notes(2010): Rule 10(e) was added in 2010 to recognize the existing practice by which some attorneys include text on both the front and back of a page. The language of Rule 10(e) is similar to a 1999 amendment to Appellate Rule 20(a)(4) regarding briefs and other documents filed in the appellate courts.

Although the two-sided document language has been added to Rule 10, which governs the form of pleadings, the provisions of Rule 10, including the two-sided document language, are also applicable to motions and other papers filed under the Massachusetts Rules of Civil Procedure. See Rule 7(b)(2) .

(1973): Rule 10(a) works no substantial change in Massachusetts practice except for requiring that the county be stated in the caption, and that "file" be changed to "docket."

Prior law required that actions be divided into "divisions of personal actions," viz. contract, tort, and replevin. See G.L. c. 231, § 1. Causes of action for tort and contract could be joined in a single declaration, provided they derived from the same subject matter, G.L. c. 231, § 7. By statute, a declaration could "contain any number of counts for different causes of action in the same division of action." See G.L. c. 231, § 7. The word "count" in Massachusetts thus signified a statement of a complete and independent cause of action.

Rule 10(b) changes prior law. The word "count" no longer carries any talismanic significance. Under Rule 10 the pleader must utilize an additional count only when such use will facilitate clear exposition of the contents of the pleadings. Further, the concept of division of actions is no longer relevant. By Rule 8(e)(2) , the pleader is entitled to state

"as many separate claims . . . as he has regardless of consistency and whether based on legal or equitable grounds."

Rule 10(c) aims to reduce the size of pleadings. Incorporating other parts of the pleading by reference will eliminate the need for repetition. Making a copy of a written instrument annexed to a pleading a part of the pleading for all purposes will likewise simplify proceedings. It should be noted that Rule 10(c) does not purport to require that any document be made part of any particular pleading. The option remains with the pleader, as it did under earlier law, G.L. c. 231, § 7, G.L. c. 231, § 147 (10), whether (1) to annex a copy of the document to the pleading; or (2) merely to rely on appropriate stating language in the body of the pleading.

Rule 10(c) abrogates that portion of G.L. c. 231, § 7 which permitted the court, upon motion of the defendant, to require the plaintiff to set out a copy of the original of the contract sued on. The net effect, however, will be the same. A defendant may, under appropriate discovery provisions, compel production by the plaintiff of the contract (or a copy); by deposition or interrogatories, he may, if the instrument is lost or destroyed, discover the particulars of the loss or destruction.

Actions on promissory notes or accounts will continue in substantially the present form. The approved forms for such actions generally follow prior Massachusetts practice. The note or account is either set out in the complaint or annexed thereto as an exhibit (and incorporated by reference), see Forms 3 and 4.

Rule 11: Appearances and Pleadings

(a). **Signing**. Every pleading of a party represented by an attorney shall be signed in his individual name by at least one attorney who is admitted to practice in this Commonwealth. The address of each attorney, telephone number, and e-mail address if any shall be stated. A party who is not represented by an attorney shall sign his pleadings and state his address, telephone number, and e-mail address if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay. If a pleading is not signed, or is signed with intent to defeat the purpose of this Rule, it may be stricken and the action may proceed as though the pleading had not been

filed. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

(b) **Appearances**.

(1) The filing of any pleading, motion, or other paper shall constitute an appearance by the attorney who signs it, unless the paper states otherwise.

(2) An appearance in a case may be made by filing a notice of appearance, containing the name, address and telephone number of the attorney or person filing the notice.

(3) No appearance shall, of itself, constitute a general appearance.

(c) **Withdrawals**. An attorney may, without leave of court, withdraw from a case by filing written notice of withdrawal, together with proof of service on his client and all other parties, provided that

(1) such notice is accompanied by the appearance of successor counsel;

(2) no motions are then pending before the court; and

(3) no trial date has been set. Under all other circumstances, leave of court, on motion and notice, must be obtained.

(d) **Change of Appearance**. In the event an attorney who has heretofore appeared, ceases to act, or a substitute attorney or additional attorney appears, or a party heretofore represented by attorney appears without attorney, or an attorney appears representing a heretofore unrepresented party, or a heretofore stated address or telephone number is changed, the party or attorney concerned shall notify the court and every other party (or his attorney, if the party is represented) in writing, and the clerk shall enter such cessation, appearance, or change on the docket forthwith. Until such notification the court, parties, and attorneys may rely on action by, and notice to, any attorney previously appearing (or party heretofore unrepresented), and on notice, at an address previously entered.

(e) **Verification Generally**. When a pleading is required to be verified, or when an affidavit is required or permitted to be filed, the pleading may be verified or the affidavit made by the party, or by a person having knowledge of the facts for and on behalf of such party.

Effective July 1, 1974; Amended March 5, 2010, effective May 1, 2010.

Reporter's Notes (2010). Rule 11(a) has been amended to require attorneys and unrepresented parties to include their e-mail addresses, if any, on pleadings. The requirement of e-mail addresses already exists in the Federal Rules of Civil Procedure (Rule 11(a), as amended in 2007) and in the Rules of the Superior Court (Rule 9A(6)), effective March 2, 2009).

The Advisory Committee Notes to the 2007 amendment to the Federal Rules of Civil Procedure state that "[p]roviding an e-mail address is useful, but does not of itself signify consent to filing or service by e-mail." Likewise, the 2010 amendment to Rule 11(a) "does not of itself signify consent to filing or service by e-mail" in civil actions in Massachusetts.

Reporter's Notes (1973): Rule 11(a) requires that papers be signed by an attorney admitted to practice in Massachusetts; this ensures that all litigation in courts of the Commonwealth will be the nominal responsibility of a member of the Bar here, even if the litigation is in fact being conducted by out-of-state counsel admitted pro hac vice. Far from multiplying costs to litigants, this requirement guarantees to other parties and the court that service and notice can be made on a local attorney, and that the court need not delay the progress of its docket to accommodate distant counsel.

The requirement of the telephone number is designed to accommodate the court and clerk's office.

The two-witness rule in Federal Rule 11(a) does not apply in Massachusetts, and hence is deleted. The words "sham and false" appearing in the Federal Rule do not seem to add to the force of the Rule. If a pleading is signed mala fide, the court's power to strike does not require an additional supporting reason.

Like Federal Rule 11, Rule 11(a) prescribes no specific sanctions against the offending attorney. Violation of the Rule would probably constitute a breach of DR 7-102(A) and (B), American Bar Association, Code of Professional Responsibility. It would also transgress the Massachusetts attorney's oath, G.L. c. 221, § 38: "I ... solemnly swear that I will do no falsehood, nor consent to the doing of any in court; I will not wittingly or willingly promote or sue any false, groundless, or unlawful suit, nor give aid or consent to the same...." The United States Court of Appeals for the First Circuit has indicated unmistakably that a defendant's attorney violates the Rule when counsel files "an answer creating issues that counsel does not affirmatively believe have a basis," Arena v. Luckenbach Steamship Co., 279 F.2d 186, 188-189 (1st Cir.1960). Yet, so far as the Reporters have been able to discover, no attorney has ever been formally disciplined for violation of Federal Rule 11. The punitory limit seems to have been the Court's action in American Automobile Association, Inc. v. Rothman, 104 F.Supp. 655, 656 (S.D.N.Y.1952): "This opinion should be filed separately in the office of the Clerk of this Court, and indexed against the name of the defendant's attorney, so that, in the event that his professional conduct in any other connection shall become a subject of inquiry, this case and this record can be referred to for such instruction as it may yield."

Rule 11(b), (c) and (d) express concisely and clearly how an attorney (or a party pro se) appears in or withdraws from a case. They reflect Massachusetts court policy.

Rule 11(b)(2) permits the entry of formal appearance prior to answer. Pre-answer appearance "will not prevent an entry of default by the clerk if the answer is not timely filed, but it will entitle the party to notice of an application for a judgment by default," 1 Field, McKusick & Wroth, Maine Civil Practice 242 (1970). See Rule 55(b).

Although under the Federal Rules, "the age-old distinction between general and special appearances" has been "abolished", Orange Theatre Corp. v. Rayherstz Amusement

Corp., 139 F.2d 871, 874 (3d Cir.1944), no Federal Rule explicitly so states. Massachusetts has up to now retained the distinction. To ensure complete understanding, therefore, it seemed essential to include in the Rules a clear indication that the mere filing of an appearance no longer constitutes a general appearance. The Rules encourage the parties to raise as many simultaneous dispositive objections as possible. A defendant may therefore, prior to answer, move to dismiss for failure to state a claim upon which relief can be granted (the Rules' rough equivalent of a demurrer) and in the same paper move to dismiss for improper venue. The cases construing Federal Rule 12 have unanimously agreed that such a double-barrelled motion does not entail a general appearance (2A Moore, Federal Practice ¶ 12.07). Rule 11(b) makes this learning explicit. Finally, under the Rules, a defendant may, during the 20-day grace period before the answer is due, pursue some of the discovery devices (e.g., depositions); it therefore seemed necessary to indicate that such pursuit does not constitute a general appearance. Admittedly, a defendant objecting on the grounds of, say, improper venue, will have little need for discovery. Cases, however, can be imagined where discovery would be necessary. A defendant in those circumstances does not appear generally simply because he seeks to bolster his defenses through discovery.

Rule 11(d) is based on prior Massachusetts practice. Its principle is simple: for the convenience of court, clerk, and other parties, any party undergoing change in representation bears the onus of bringing word of that change to all concerned; until such notification, anyone is entitled to rely on the previous record.

Rule 12: Defenses and Objections - When and How Presented - By Pleading or Motion - Motion for Judgment on Pleadings

(a) **When Presented**.

(1) After service upon him of any pleading requiring a responsive pleading, a party shall serve such responsive pleading within 20 days unless otherwise directed by order of the court.

(2) The service of a motion permitted under this rule alters this period of time as follows, unless a different time is fixed by order of the court: (i) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (ii) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) **How Presented**. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading

thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter;

(2) Lack of jurisdiction over the person;

(3) Improper venue;

(4) Insufficiency of process;

(5) Insufficiency of service of process;

(6) Failure to state a claim upon which relief can be granted.

(7) Failure to join a party under Rule 19;

(8) Misnomer of a party;

(9) Pendency of a prior action in a court of the Commonwealth;

(10) Improper amount of damages in the Superior Court as set forth in G. L. c. 212, §3 or in the District Court as set forth in G. L. c. 218, §19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. A motion, answer, or reply presenting the defense numbered (6) shall include a short, concise statement of the grounds on which such defense is based.

(c) **Motion for Judgment on the Pleadings**. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) **Preliminary Hearings**. The defenses specifically enumerated (1)-(10) in subdivision (b) of this rule whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) **Motion for More Definite Statement**. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a

responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) **Motion to Strike**. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may after hearing order stricken from any pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter.

(g) **Consolidation of Defenses in Motion**. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) **Waiver or Preservation of Certain Defenses**.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, misnomer of a party, pendency of a prior action, or improper amount of damages is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a) or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Effective July 1, 1974. Amended November 28, 2007, effective March 1, 2008, May 6, 2008, effective July 1, 2008.

Reporter's Notes (2008): Rule 12(b) has been amended to add a new numbered defense, 12(b)(10). This defense permits a defendant to raise by motion to dismiss the issue whether the amount of damages that the plaintiff is reasonably likely to recover meets the requirements of G.L. c. 212, §3 (Superior Court) or G.L. c. 218, §19 (District Court and Boston Municipal Court). Under G.L. c. 212, §3, an action may proceed in the Superior Court "only if there is no reasonable likelihood that recovery by the plaintiff will be less

than or equal to $25,000...." Under G.L. c. 218, 19, an action may proceed in the District Court or Boston Municipal Court "only if there is no reasonable likelihood that recovery by the plaintiff will exceed $25,000...." Before the addition of new Rule 12(b)(10), the issue whether the plaintiff met the statutory requirements regarding the $25,000 amount was not included among the defenses enumerated in Rule 12(b), and presumably could be raised only in the answer. With this amendment, the issue may now also be raised by a motion to dismiss. In addition, Rule 12(h) has been amended to provide that failure to raise improper amount of damages in a motion to dismiss or answer constitutes a waiver. Violation of the statutory requirements regarding the $25,000 amount is procedural, not jurisdictional. G.L. c. 212, 3A(b); G.L. c. 218, 19A(b). See Sperounes v. Farese, 449 Mass. 800 (2007).

In Sperounes, the Court held that under the statewide one-trial system, a District Court judge must dismiss an action where an objection has been made and where there is a reasonable likelihood the plaintiff will recover more than $25,000. However, where the defendant does not object, a District Court judge has the discretion to dismiss the action sua sponte or to permit it to proceed. Sperounes v. Farese, supra at 806-807.

A 2008 amendment to Rule 12 added a new numbered defense, 12(b)(10), improper amount of damages in the Superior Court, District Court, and Boston Municipal court. This prior amendment was part of a group of amendments to the Massachusetts Rules of Civil Procedure in light of the adoption of the statewide one-trial system for civil cases. This second 2008 amendment to Rule 12 corrects an oversight in the prior group of amendments. The correction changes the language in Rule 12(d) from "defenses specifically enumerated (1)-(9) in subdivision (b)" to "defenses specifically enumerated (1)-(10) in subdivision (b)." The amendment to 12(d) is technical in nature and merely reflects the additional numbered defense provided by Rule 12(b)(1)-(10).

Reporter's Notes (1973): Rule 12 prescribes the basic timetable for responsive pleading and the basic mechanism for raising defenses based solely on the pleadings. Rule 56 (Summary Judgments) interrelates with the remedies afforded by Rule 12, especially Rule 12(b)(6) and Rule 12(c). But Rule 56 encompasses matters (as, for example, supporting affidavits) not confined strictly to the pleadings. A court in deciding any motion brought under any part of Rule 12 initially looks only at the pleadings.

Under Rule 12(a)(1) the deadline for filing responsive pleadings is 20 days from receipt of the pleading calling for a response. In actions involving the United States, Federal Rule 12(a) extends this period to 60 days principally to allow the necessary correspondence with the Department of Justice and any other department or agency involved in the litigation. No such extension is necessary in Massachusetts, so Rule 12 makes no special provision for suits against the Commonwealth, its subdivisions, officers, agencies, and the like.

Filing any motion under Rule 12 “stops the clock” on the 20-day responding period. The clock resumes when the court either denies the motion or indicates a postponement of its decision until the trial. From the date of notice of the denial or indication, the moving party (the party obligated to respond to the pleading) has 10 days to serve his response unless the court orders otherwise. If the court grants the motion, the pleading is stricken (that is, the complaint is dismissed or the answer is stricken). In Federal practice, the dismissal or the striking is usually conditional; by amending within a period set by the court, or by otherwise eliminating the defect, the pleader can reinstate the pleading. From that point, the party originally required to respond must do so within whatever time may remain of the original period of response, or 10 days, whichever is longer, unless the court orders otherwise, Rule 15(a).

It will be convenient here to consider, out-of-order, motions for more definite statement under Rule 12(e). Because the type of “notice pleading” authorized by the Rules encourages indefinite and generalized complaints, motions for more definite statements are rarely justified. They will generally be granted only if after an indulgent reading the court concludes that the party required to respond to the pleading will not be able fairly to meet the pleading's allegations. If such motion is granted, the court will order that a more definite statement be served within any time the court may order. From receipt of the amended pleading, the opposing party has 10 days to serve his response.

Rule 12(b), taken, with the exception of Rule 12(b)(8) and (9), directly from Federal Rule 12(b), is the heart of the defensive pleading rules. It covers all the defensive maneuvers previously available in Massachusetts practice: motion to dismiss, special answer, pleas or answer in abatement, plea in bar, and demurrer. The pleader may if he chooses raise any of the nine numbered defenses in his responsive pleading. If, as will much more likely be the case, he elects to raise them by motion, he is bound by three restrictions:

(a) He must make the motion before serving any responsive pleading (Rule 12(b));

(b) He must include in his motion any defense or objection *then* available (Rule 12(g) and 12(h)(1)); and

(c) If his motion fails to object to personal jurisdiction, venue, process, service of process, or misnomer of a party, he permanently waives any such omitted objection (Rule 12(h)(1)-(2)). The idea here is to conserve judicial time by preventing a defendant from serially raising objections which the plaintiff might well be able to meet. Each of the defects covered by Rule 12(b)(2)-(5) and (8) is curable. Were a defendant permitted to raise such objections one at a time, the court might have to hear and determine as many as five separate motions. By contrast, lack of subject-matter jurisdiction (Rule 12(b)(1)) is generally not curable, and certainly not waivable. Because such a defect is central to the court's basic power to hear the action at all, the issue should remain open throughout, as under prior law. Jones v. Jones, 297 Mass. 198, 202, 7 N.E.2d 1015, 1018 (1937). Failure of a pleading to state a claim upon which relief can be granted, failure to state a

legal defense, and failure to join an indispensable party are, true enough, curable defects, in the sense that a pleading may be amended or (frequently though not invariably) a hitherto absent party may be brought into the lawsuit. But such matters are so central to the justiciability of the dispute that failure to raise them by motion should not preclude raising them at an appropriate later stage in the litigation.

It should be emphasized here that although the three "favored" objections must be included in any pre-response motion, failure so to include them merely precludes their being raised by any subsequent or additional pre-pleading motion. They may, however, be raised (Rule 12(h)(2)):

(a) In the responsive pleading itself;

(b) In a motion for judgment on the pleadings under Rule 12(c); or

(c) At the trial on the merits, presumably by motion.

The lack of subject-matter jurisdiction may be raised at any time up to final judgment on appeal, in any way, by any party, or by the court sua sponte.

Under prior Massachusetts practice, the courts resolve the problem of successive proceedings based upon the same facts in different ways, depending upon the classification of the dispute, see Stahler v. Sevinor, 324 Mass. 18, 23, 84 N.E.2d 447, 449 (1949), and cases there cited: (1) if the two actions were both at law, the court ordinarily ordered abatement of the second action; (2) if the two suits were in equity, the plaintiff had to elect dismissal of one; and (3) if one proceeding was at law and the other in equity, the plaintiff likewise had to elect. Rule 12(b)(9) alters these principles. It assumes that the court, rather than the parties should determine the location of the ultimate litigation; conceivably, for example, the presence in the subsequent action of additional parties might dictate that judicial time and energy would best be conserved by concentrating the litigation in the second court. Whatever the decision, the rule sets up the mechanism to effectuate the court's determination: (a) The court may dismiss the later action; or (b) it may require the parties to stipulate a voluntary dismissal of the prior action. Such stipulation is necessary in order to meet the requirements of Rule 41(a)(1)(ii).

A motion under Rule 12(b)(6), like the traditional demurrer, tests the legal sufficiency of the complaint, counterclaim, or cross-claim. It should be allowed if and only if "*it appears to a certainty that [the claiming pleader] is entitled to no relief under any state of facts which could be proved in support of the claim*." 2A Moore, Federal Practice 2245 (original emphasis).

A demurrer looked only to the pleading which it treated. A Rule 12(b)(6) motion may be similarly limited. If, however, in treating the motion, either at the preliminary hearing prescribed in Rule 12(d) or otherwise, the court considers matters outside the pleadings, including uncontroverted allegations by counsel, the motion will be treated as a motion for summary judgment under Rule 56, and all parties, including parties who may not be

joining in the original motion, will be afforded an opportunity to present material pertinent to a Rule 56 motion. Under prior practice, a “speaking” demurrer would be dismissed. Davenport v. Town of Danvers, 332 Mass. 580, 582, 126 N.E.2d 530, 531 (1955).

One other distinction between Rule 12(b)(6) and demurrer practice should be noted. In Massachusetts, a demurrer had to stand alone and could not be presented along with other motions or with an answer to the declaration or bill. The Rules encourage, indeed require, concentration of defensive pleadings and motions. Therefore the defense raised by Rule 12(b)(6), whether in motion, answer, or otherwise, may be presented either alone or in combination. A motion under Rule 12(b)(6) must contain a statement of grounds. This closely resembles prior practice, G.L. c. 231, § 16.

Rule 12(c) is designed to cover the rare case where the answer admits all the material allegations of the complaint (or the reply admits all the allegations of the counterclaim) so that no material issue of fact remains for adjudication. Because under Rule 8(d) all allegations in the usual answer (that is, one to which no reply is required or permitted) are taken as denied, a defendant will normally not even be eligible to move for judgment on the pleadings. If, in any event, the court considers matters outside the pleadings, the motion will be treated as one for summary judgment under Rule 56.

The Rules abolish the bill of particulars, see e.g., G.L. c. 231, § 14 (a bill of particulars must be filed in an action on the common counts). Under the principles of notice-pleading espoused by the Rules, a responding party is supposed to obtain clarification of his opponent's vague pleading through use of the various discovery procedures, particularly interrogatories (Rule 33) and depositions (Rule 30). Occasionally, however, a pleading may be so murky that it defies any intelligent response. In that rare case, Rule 12(e) permits the responding party to bring his specific inability to the court's attention and permits the court to order an appropriate amendment.

Rule 12(f) indicates explicitly that although the court may, sua sponte, clean up the pleadings (literally and figuratively) at any time, it may strike an insufficient defense only if the plaintiff takes the initiative. A motion to strike a defense as insufficient is the counterpart of a motion under Rule 12(b)(6), see Lehmann Trading Corp. v. J & H Stolow, Inc., 184 F.Supp. 21, 22 (S.D.N.Y.1960). Although Federal Rule 12(f) makes no provision for the court's consideration of matters outside the pleadings, the federal courts have done so, Wilkinson v. Field, 108 F.Supp. 541, 545 (W.D.Ark.1952), 2A Moore, Federal Practice 2320. Accordingly, the Reporters felt that such provision ought to be made explicit. Under Rule 12(f), as under existing federal practice, a motion to strike an insufficient defense searches the pleadings; in hearing such a motion, the court may properly dismiss the *complaint* for failure to state a claim upon which relief can be granted, just as though the defendant had been the moving party under Rule 12(b)(6), Gunder v. New York Times Co., 37 F.Supp. 911, 912 (S.D.N.Y.1941).

Rule 13: Counterclaim and Cross-Claim

(a) **Compulsory Counterclaims**. A pleading shall state as a counterclaim any claim for relief the court has power to give which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not either require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction or constitute an action required by law to be brought in a county or judicial district, as the case may be, other than the county or judicial district in which the court is sitting. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13, or (3) if part or all of the pleader's claim is based upon property damage arising out of a collision, personal injury, including actions for consequential damages, or death. In actions in the Land Court for registration and confirmation pursuant to G.L. c. 185, and tax title foreclosures, brought pursuant to G.L. c. 60, no party may assert a counterclaim under this subdivision or subdivision (b), except by leave of court.

(b) **Permissive Counterclaims**. A pleading may state as a counterclaim any claim against an opposing party.

(c) **Counterclaim Exceeding Opposing Claim**. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) **Counterclaim Against the Commonwealth**. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the Commonwealth of Massachusetts or a political subdivision thereof, or any of their officers and agencies.

(e) **Counterclaim Maturing or Acquired After Pleading**. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) **Omitted Counterclaim**. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) **Cross-Claim Against Co-Party**. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the

subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) **Joinder of Additional Parties**. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

(i) **Separate Trials; Separate Judgments**. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

Amended Dec. 13, 1981, effective Jan. 1, 1982; amended May 3, 1996, effective July 1, 1996; amended November 28, 2007, effective March 1, 2008.

Reporter's Notes (2008): Rule 13(j) ("Transferred, Appealed and Removed Actions") has been deleted. It had been included in the original version of the Mass. R. Civ. P. because the Massachusetts Rules of Civil Procedure, when first promulgated, did not apply in the District Court.

Reporter's Notes (1996) Rule 13(a) has been amended to add references to "judicial district" to take into account the applicability of the Rules to the District Court and Boston Municipal Court. It should be noted that Rule 13(j), which did not appear in the District Court version of the Rules, appears in the merged set of Rules.

Reporter's Notes (1973): Rule 13 regulates claims of relief by defendants against plaintiffs (counterclaims) and as between parties on the same side of the versus (cross-claims). Rule 13 changes prior practice.

Under prior practice, by statute, G.L. c. 232, §§ 1-11, if a defendant had a liquidated or readily calculable claim in *contract,* he could seek *set off.* The respective claims of the plaintiff and the defendant need not have arisen out of the same transaction; but they must have been mutual. Thus if a plaintiff sued two defendants on, say, a note, the claim sought to be set off must have been due from the plaintiff to *both* defendants, G.L. c. 232, § 3. Set off would not lie for a tort claim, Lane v. Volunteer Cooperative Bank, 307 Mass. 508, 511, 30 N.E.2d 821, 823 (1940); Pitts v. Holmes, 10 Cush. 92, 94 (1852). Affirmative relief was available.

At common-law, a defendant could seek *recoupment,* provided: (1) his claim arose out of the same contract or transaction as that sued on; and (2) he was content merely to cancel out plaintiff's claim, without obtaining any affirmative relief, Wright v. Graustein, 248 Mass. 205, 210, 142 N.E. 797, 799 (1924).

In equity, a defendant could plead a *counterclaim.* If the defendant's claim arose out of the subject matter of the suit, and could itself support an independent suit in equity, the counterclaim was compulsory. The counterclaim was, however, only permissive if the

defendant's claim: (1) arose out of the same transaction, but was legal in nature; or (2) arose out of a different transaction, but was equitable in nature. A counterclaim had the same effect as a cross-bill in equity; it enabled the court in appropriate circumstances to grant affirmative relief.

Cross-claims, that is, claims against one or more co-parties, could be brought either: (a) in a separate action, consolidated for trial; or (b) (if the case was in equity) by way of so-called counterclaim under S.J.C.Rule 2:13 or Super.Ct.Rule 32, whose strictures have just been discussed.

Rule 13(a) greatly simplifies pre-existing procedure. Basically, with exceptions discussed below, it requires a defendant or third-party defendant (hereinafter jointly referred to as "defendant") to assert against the plaintiff or third-party plaintiff (hereinafter "plaintiff") any claim which the defendant may have against the plaintiff provided the claim arises out of the factual nexus of the plaintiff's claim. The requirement is mandatory if the counterclaim arises out of the transaction or occurrence which is the subject of the plaintiff's claim; the defendant must assert it, or forever lose it. Such a counterclaim is denominated "compulsory" precisely because failure seasonably to raise it permanently forfeits it. This feature sharply differs from prior Massachusetts practice, at least with regard to set-off. Prior law permitted the defendant to withhold pleading a set-off without risk of waiver, see Hunt v. Brown, 146 Mass. 253, 255, 15 N.E. 587, 590 (1888). With respect, however, to a compulsory counterclaim under Super.Ct.Rule 32 (and presumably also under S.J.C.Rule 2:13), it appears that a failure to plead invites loss of right, see Buckley v. John, 314 Mass. 719, 721, 51 N.E.2d 317, 319 (1943).

Classification of a counterclaim as compulsory or permissive depends in turn upon a definition of "transaction or occurrence." The word "transaction", in the present context, has been defined thus: " '[A] transaction is where both causes of action proceed from the same wrong.' " Potier v. A.W. Perry, Inc., 286 Mass. 602, 608, 190 N.E. 822, 824-825 (1934). As the court there suggested, the governing rule "should be construed in a sense to effectuate the settlement in one proceeding of controversies so closely connected as appropriately to be combined in one trial in order to prevent duplication of testimony, to avoid unnecessary expense to the parties and to the public, and to expedite the adjudication of suits." Interpreting the old Federal Equity Rule 30, the United States Supreme Court expressed a similar view: " 'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." Moore v. New York Cotton Exchange, 270 U.S. 593, 610, 46 S.Ct. 367, 371, 70 L.Ed. 750 (1926). Approximately the same meaning should be assigned to the phrase "transaction or occurrence", as it appears in Rule 13(a). "The use of the word 'occurrence' in the rule in connection with the word 'transaction' can serve no other purpose than to make clear the meaning of the word 'transaction.' ... The word 'transaction' commonly indicates an act

of transacting or conducting business but in the rule under consideration it is not restricted to such sense. It is broad enough to include an occurrence. ... The words ‘transaction’ and ‘occurrence’ probably mean, whatever may be done by one person which affects another's rights and out of which a cause of action may arise. ... A familiar test may be applied by inquiring whether the same evidence will support or refute the opposing claims.” Williams v. Robinson, 1 F.R.D. 211, 213 (D.D.C.1940).

Even though a given counterclaim arises out of the transaction or occurrence that underlies the plaintiff's claim, it may still avoid being labelled compulsory, provided one of the following conditions obtains:

(a) The court lacks power to confer the relief sought.

(b) The defendant does not have the claim at the time he serves his answer. Any later-blooming claims may be asserted by way of appropriate amendment, either under Rule 13(e) or Rule 15(a).

(c) To award relief upon the counterclaim, the court would require the presence of parties over whom it cannot acquire jurisdiction.

(d) The counterclaim is already the subject of an action by the present defendant against the present plaintiff. Rule 12(b)(9) and Rule 42(a) (consolidation) will permit the court to take any appropriate steps to prevent improper duplication of effort.

(e) The plaintiff commenced his action by process which did not subject the defendant to an unlimited judgment. Assume, for example, that the action was begun by trustee process against a non-resident's bank account. If the defendant appears merely to defend the dollar amount trusteed, without raising any counterclaim, it does not seem fair to require him--on pain of permanent preclusion--to assert a counterclaim which he might otherwise have chosen to commence in a different forum. Of course, if the defendant voluntarily chooses to raise *any* counterclaim, there seems no reason why he should not be required, as a matter of sensible judicial economy, to raise all counterclaims, which would normally be labelled “compulsory.”

(f) If part or all of the pleader's claim is based upon property damage arising out of a collision, personal injury, including actions for consequential damages, or death. This exception is *primarily* directed at actions arising out of automobile accidents.

The application of the compulsory counterclaim rule to automobile accidents, where the defendant is usually represented by an attorney for the insurance company, presents several difficulties. These difficulties are set out in the following excerpt from 1 Field, McKusick & Wroth, Maine Civil Practice, pp. 263-264 (1970):

“The objective of Rule 13(a) as originally promulgated was to avoid the possibility of two trials on the same facts and the further possibility of the defendant's inadvertent loss of his own claim by reason of the adverse determination in the first trial of facts essential

to that claim. Desirable though that objective may be conceded to be, the rule did not work satisfactorily in motor vehicle actions in which, as is usually the case, the defendant carried liability insurance.

“Under the terms of its policy, the insurer controls the defense of such actions. Counsel for the insurer properly felt obligated to notify the assured of the compulsory counterclaim rule, with the likely result that the assured would request him to handle the counterclaim. If counsel acceded to the request, it caused resentment on the part of the ‘plaintiff bar’ that a member of the ‘defendant bar’ had pre-empted law business which he would not have had under the prior practice where an independent action was required. This resentment was particularly serious in the mind of the attorney who by reason of former representation of the assured in other matters looked upon him as a regular client. Moreover, when the same lawyer was charged with protecting both the interests of the insurance company in defending a claim and the interests of the assured in asserting a claim, problems of conflict of interest would naturally arise. On the other hand, if the insurer's counsel told the assured that he must retain his own lawyer for the prosecution of the counterclaim, the assured found it hard to understand why two lawyers were necessary to do the work of one. The layman's reaction was likely to be adverse both to the insurer's attorney and the legal profession generally.

“Criticism of the rule was statewide and came both from lawyers who habitually represented plaintiffs and those who habitually represented insurance companies. After several months of experience with the rule, the Supreme Judicial Court concluded that there was sufficient merit to this criticism to warrant the elimination of the compulsory counterclaim requirement in these cases. Since the complaints evoked by the rule involved motor vehicle cases, the Court limited the amendment to this type of case.”

Massachusetts Rule 13(a) does not limit the application of the exception to the compulsory counterclaim to motor vehicle accidents for two reasons:

1. In actions for property damage the same reasons which warrant the exception in cases of motor vehicle accidents are present in cases involving other types of collisions (e.g., a collision of motor boats). Thus the language “property damage arising out of a collision” appears appropriate.

2. Most personal injury cases involve actions against owners or possessors of property for injury resulting from a defective condition of the premises, or actions arising out of collisions. Representation by an attorney for an insurance company is just as likely in the former type of case as in the latter. While it is obvious that the former type of case would rarely lend itself to the use of the counterclaim, if a counterclaim does exist, it should not, for the same reasons present in the collision cases, be compulsory.

Rule 13(b) tracks Federal Rule 13(b), but omits the final clause, thus making clear that the defendant may at his option assert as a counterclaim any claim whatsoever, even though some other portion of Rule 13 might give the defendant the option of omitting it.

Rule 13(c) changes prior Massachusetts practice which, as previously indicated, permitted affirmative recovery only in set-off, not in recoupment. It will also allow the defendant who raises a legal counterclaim against an equitable claim by the plaintiff to retain his jury right on the counterclaim. This too will change prior law, Gulesian v. Newton Trust Co., 302 Mass. 369, 371, 19 N.E.2d 312, 313-314 (1939).

Rule 13(d) reemphasizes that the Rules do not purport to change substantive rights, in this case against the Commonwealth, its political subdivisions, or any of their officers and agencies.

Rule 13(e) echoes the general assumption of the Rules that issues between the parties should be resolved in as few lawsuits as possible. In Massachusetts, a claim acquired after commencement of the action was not available in set-off. Jump v. Leon, 192 Mass. 511, 513, 78 N.E. 532 (1906). Rule 13(e) changes this practice. A late-arising counterclaim may be added at any time by leave of court. Presumably, if at the time the counterclaim is acquired, a reply has not yet been served to the original counterclaim, the defendant may add the new counterclaim by way of amendment under Rule 15(a).

If the defendant owned the counterclaim at the time of serving his original answer, but omitted it excusably, Rule 13 allows the court to permit an amendment; this is similar to prior Massachusetts practice, Scullin v. Cities Service Oil Co., 304 Mass. 75, 22 N.E.2d 666 (1939); Hall v. Rosenfield, 177 Mass. 397, 59 N.E. 68 (1901). Under appropriate circumstances, a Rule 15(a) amendment may also be allowed.

For applicable periods of limitation, see G.L. c. 260, § 36 (as amended).

Up to this point, Rule 13 has dealt with claims back against the plaintiff by the defendant. Rule 13(g) regulates claims between co-parties, that is, parties on the same side of the *versus.* Previously, defendants in equity suits could cross-claim (the Massachusetts Rules used the word "counterclaim") under the same conditions regulating a counterclaim against the plaintiff. Rule 13(g) somewhat narrows this practice. It permits a cross-claim under only two sets of circumstances: (1) the cross-claim arises out of the transaction or occurrence underlying the original action or a counterclaim; or (2) the cross-claim relates to property which is the subject matter of the original action.

This Rule does not purport to prescribe machinery for resolving in one litigation all the disputes between all the parties. To begin with, it is entirely permissive. Failure to assert a cross-claim will never forfeit the right to commence an independent action. Further, the rule allows only those cross-claims fairly closely associated with the principal dispute.

Rule 13(g) permits assertion against a co-party of what is in effect a third-party complaint under Rule 14. The chief difference is that under Rule 13(g), both co-parties are, by

definition, potentially liable to the opposing party; under Rule 14, the third-party defendant will not even be potentially liable to the plaintiff unless the plaintiff chooses specially to assert such a claim directly against the third-party defendant.

Rule 13(h) makes effective as to counterclaims and cross-claims the provisions of Rules 19 and 20. These deal respectively with the joinder of necessary parties, and the joinder of additional parties. The practice is reasonably familiar in Massachusetts. For the manner of serving such parties, see Rule 4(f).

Rule 13(i) authorizes the court to order separate trials (Rule 42) and to enter separate judgment on a cross-claim or a counterclaim (Rule 54(b)). Rule 13(i), like earlier Massachusetts practice, Bordonaro v. Vandenkerckhaven, 322 Mass. 278, 281, 76 N.E.2d 755, 757 (1948), permits the court to give judgment on a counterclaim or cross-claim even though the plaintiff's claim may have been dismissed.

Since the rules are not applicable to the district courts, Rule 13(j) provides for cases transferred, appealed or removed to the Superior Court. Rule 13(j) provides for a twenty-day period from the transfer, removal or appeal during which the defendant must (if Rule 13(a) is applicable) or may (if Rule 13(b) is applicable) amend the answer so as to assert any counterclaims. This twenty-day period applies only to asserting a counterclaim; the time for reply to a counterclaim would be governed by Rule 12(a). Rule 13(j) also sets a similar 20-day time limit for assertion of cross-claims (i.e., claims between parties on the same side of the *versus*). The requirements of Rule 13(j) do not apply to any case which was *tried* in a district court before removal or appeal.

Rule 14: Third-Party Practice

(a) **When Defendant May Bring in Third Party**. At any time after commencement of the action a defending party, as a third-party plaintiff, may (except in cases of registration and confirmation in the Land Court brought pursuant to G.L. c. 185) cause a summons and complaint to be served upon a person who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 20 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the

third-party plaintiff, and the plaintiff thereupon shall assert his defenses as provided in Rule 12 and his counterclaims as provided in Rule 13. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) **When Plaintiff May Bring in Third Party**. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

Amended Dec. 13, 1981, effective Jan. 1, 1982.

Reporter's Notes (1973): Rule 14 largely tracks Federal Rule 14; it also closely approximates G.L. c. 231, § 4B as amended, which was deliberately patterned upon that version of Federal Rule 14 extant at the time the statute was passed (1964).

Rule 14 allows a defendant to implead a third party defendant without leave of court if the third party complaint is served within 20 days after service of the original answer; thereafter leave of court is required. This changes prior law which allowed 90 days after service of the answer for impleader without leave of court. See Mass.G.L. c. 231 § 4B as amended in 1973.

In most cases, the defendant/third-party plaintiff will be fully aware of potential third-party defendants well before the deadline. He will therefore file his third-party pleadings promptly. Admittedly, sometimes even diligent preparation will not disclose to the original defendant's attorney the possibility of a third-party action until the deadline has passed. In such cases, the court will grant leave almost as of course. The purpose behind the restriction is the belief that unbridled third-party practice offers an unscrupulous attorney an opportunity to delay trial; by commencing a third-party suit, he can hold up the proceedings for the length of time necessary to permit the new third-party defendant to answer and otherwise defend. Under the Rule, however, the court will have an opportunity to examine any late-blooming third-party claims. It can (and should) deny leave when it is convinced that the third-party claim is not bona fide, or is interposed for the purpose of delay.

The amendment to G.L. c. 231 § 4B struck from the statute the words "not a party to the action", which therefore do not appear in Rule 14(a). This eliminates a doubt which existed prior to the amendment, viz., whether a third-party complaint could be served only on a non-party. The deletion emphasizes that the purpose of Rule 14 is to encourage the joinder in a law suit of all parties who may reasonably be said to have an interest (in the legal sense) in the final disposition of the litigation. The combined effect of Rule 14

and Rule 13 (which is explicitly referred to in the body of Rule 14(a)) will be to ensure a single piece of litigation where previously two or more had been necessary.

Rule 14 frankly aims at telescoping litigation. It will therefore find appropriate use in situations of indemnity, and in situations testing the possibility of contribution among joint tortfeasors (G.L. c. 231B §§ 1-4), although these latter will more generally be resolved by cross-claims under Rule 13. Because Rule 14 expressly allows what is in effect anticipatory litigation, a third-party defendant may not and should not object on the grounds that the defendant's liability has not yet been established.

It should be noted that Rule 14, like Federal Rule 14 and G.L. c. 231 § 4B as amended, does not permit the defendant to "tender" an additional defendant to the plaintiff. If the plaintiff has not chosen to sue the prospective third-party defendant, the original defendant may bring in the third-party defendant only if the third-party defendant "is or may be liable to" the original defendant. If the prospective third-party defendant is also potentially directly liable to the plaintiff, then the plaintiff, as the rule explicitly states, "may assert any claim against the third-party defendant;" but he need not do so. The rule already requires responses from the third-party defendant; language has been inserted to extend this requirement to the plaintiff in the event that the third-party defendant asserts any claim against him. It is not clear why such language does not appear in the Federal Rule (although the requirement has been assumed, 3 Moore, Federal Practice 614). The insertion will remove all doubt.

Rule 15: Amended and Supplemental Pleadings

(a) **Amendments**. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served and prior to entry of an order of dismissal or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **Amendments to Conform to the Evidence**. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of

the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) **Relation Back of Amendments**. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment (including an amendment changing a party) relates back to the original pleading.

(d) **Supplemental Pleadings**. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading it shall so order, specifying the time therefor.

Effective July 1, 1974.

Reporter's Notes (1973): The first part of Rule 15(a) allows a party to amend his pleading prior to entry of an order of dismissal, under certain circumstances, once, as a matter of course. The circumstances are: (1) the pleading is one with respect to which a responsive pleading is permitted (see Rule 7(a)) and no responsive pleading has yet been served; or (2) the pleading is one to which no responsive pleading is permitted (see Rule 7(a)) and the action has not yet been placed on the trial calendar. In the first case, no time limit is imposed; in the second, amendment must take place within 20 days after service of the original pleading.

Rule 15(a) is the same as Federal Rule 15(a) except that it also specifically limits the right of amendment *as a matter of course* to the situation where there has not been an order of dismissal.

Because a motion is not considered a pleading within the meaning of Rule 15 (see Rule 7(a)), Federal Rule 15(a) if read literally, would permit a plaintiff to amend his pleading, without leave of court, even after the Court had granted a motion to dismiss or a motion for summary judgment.

Most of the federal courts which have considered the matter have held that a motion is not a pleading within the meaning of Rule 15(a). Thus a mere *filing* of a motion to dismiss does not prevent the plaintiff from amending his complaint as a matter of right. See Keene Lumber Co. v. Leventhal, 165 F.2d 815 (1st Cir.1948). It is however unclear whether the plaintiff should be entitled to amend his complaint as a matter of right after a

motion to dismiss or a motion for summary judgment has been *granted.* The Court in *Keene Lumber Co.* held that the plaintiff's right to amend as a matter of course ended with the granting of the motion to dismiss; so have most courts which have considered the matter. There are however enough contrary decisions to cause the matter to be handled by a specific provision in Rule 15(a). See Breier v. Northern California Bowling Prop. Ass'n, 316 F.2d 787, 789 (9th Cir.1963); Peckham v. Scanlon, 241 F.2d 761 (7th Cir.1957).

The right to amend as a matter of course should not extend beyond the granting of a motion to dismiss or a motion for summary judgment. Because the plaintiff, who has already had an opportunity to amend prior to the disposition of the motion, nonetheless chose to stand (unsuccessfully) on his original pleading, the defendant who successfully moved against such pleading should at the least be allowed to oppose the amendment. This does not burden the plaintiff unduly, since even if leave of court is made a requirement, such leave will be liberally granted. See Moore, Federal Practice § 15.07[2], (2d ed. 1968). And even if leave to amend is not granted, the plaintiff may still move for relief under Rules 59(e) or 60(b). These rules contain time limits, while present post-dismissal practice under Rule 15(a) does not.

The second part of Rule 15(a) deals with amendments by leave of court or by written consent of the adverse party. Rule 15(a) specifically provides that "leave shall be freely given when justice so requires."

In Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), the Court strongly reaffirmed this mandate.

Rule 15(a) clearly alters prior Massachusetts practice. Amendment as a matter of right did not exist in Massachusetts. See G.L. c. 231, §§ 51-56. Motions to amend were addressed to the discretion of the trial judge. Reilly v. Revere Racing Ass'n Inc., 349 Mass. 763, 208 N.E.2d 232 (1965). Thus an exception to the denial of a motion to amend merely raises the question of abuse of discretion by the trial judge. Magaletta v. Millard, 346 Mass. 591, 195 N.E.2d 324 (1964).

Under the interpretation of Federal Rule 15(a) in *Keene Lumber,* supra, the plaintiff has the *right* to one amendment, without leave of court, even though the defendant has filed a motion to dismiss the complaint.

Rule 15(a) changes Massachusetts law in another material respect. Under prior practice an amendment setting out new causes of action could not be allowed. Boston Trust Funds Inc. v. Henderson, 341 Mass. 730, 170 N.E.2d 318 (1960); Beckwith v. Massachusetts Turnpike Authority, 354 Mass. 766, 238 N.E.2d 364 (1968). No such limitation exists under Rule 15. Indeed, Rule 15(d) permits the court, on terms, to allow a party to serve a supplemental pleading setting out further transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Previously,

Massachusetts law did not allow an amendment to a declaration attempting to introduce a cause of action that did not exist when the action was brought. Sharpe v. Metropolitan Transit Authority, 327 Mass. 171, 97 N.E.2d 399 (1951).

Rule 15(b), which tracks Federal Rule 15(b), does not significantly change Massachusetts procedure. Issues, to whose trial the parties expressly or impliedly consent, will, even if not raised by the pleadings, be treated in all respects as if they had been so raised. Although such amendment of the pleadings to conform to the evidence may be made at any time, failure to amend does not affect the result of the trial.

If a party objects at the trial to evidence on the ground that it is not within the issues made by the pleadings, Rule 15(b) enjoins the court freely to allow amendment unless the objecting party satisfies the court that admission of such evidence would prejudice his case on the merits. A continuance may be granted to the objecting party to meet the evidence.

This rule differs slightly from previous Massachusetts practice. Although language of Mass. G.L. c. 231, § 51 ("at any time before judgment") appears sufficiently broad to permit the trial judge to allow amendment during trial where an objection is made to the admission of certain evidence, the Court in Lewis v. Russell, 304 Mass. 41, 45, 22 N.E.2d 606, 608-609 (1939) held that defective pleading cannot be cured merely by reference to the plaintiff's evidence. But even in *Lewis,* supra, the Court concluded: "This decision does not affect the power of the Superior Court in its discretion to allow the defendant to amend her answer on motion filed before judgment if, under all of the circumstances, justice appears to require such amendment."

Rule 15(c) provides for the relation back of amendments whenever the claim or defense asserted arose out of the conduct, transaction or occurrence attempted to be set forth in the original pleading. This provision ties directly to the statute of limitations.

Under Federal Rule 15(c) an amendment changing the party against whom a claim is asserted may relate back (and thus preclude a statute of limitations defense) if the claim in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Massachusetts practice is more liberal than Federal Rule 15(c) in allowing amendments adding or substituting party defendants after expiration of the period of limitations. The Massachusetts rule is set out in detail in Wadsworth v. Boston Gas Company, 352 Mass. 86, 88-89, 223 N.E.2d 807, 809-810 (1967) in the following language:

"... It has often been said that the running of the statute of limitations is not a reason for denying an amendment and may furnish a reason for allowing it. Johnson v. Carroll, 272 Mass. 134, 138, 172 N.E. 85; Peterson v. Cadogan, 313 Mass. 133, 134, 46 N.E.2d 517, and cases cited. In general, the law in this Commonwealth with respect to amendments is more liberal than elsewhere, and cases from other jurisdictions are not in point. Neszery v. Beard, 226 Mass. 332, 334, 115 N.E. 420. See Ideal Financing Ass'n Inc. v. McPhail, 320 Mass. 521, 523, 70 N.E.2d 311.

"There is ample authority for the proposition that where an action has been commenced before the statute of limitations has run, a plaintiff may be allowed to substitute one defendant for another after the statute of limitations has run against the proposed substitute defendant. McLaughlin v. West End St. Ry., 186 Mass. 150, 151, 71 N.E. 317. Genga v. Director Gen. of Railroads, 243 Mass. 101, 104, 137 N.E. 637, and cases cited. After the amendment has been allowed and the defendant brought into court by due process, the substitution relates back to the date of the writ and makes the substituted defendant a party from that date. Johnson v. Carroll, 272 Mass. 134, 137, 172 N.E. 85. We discern no difference in principle between permitting a plaintiff to substitute a defendant and permitting a plaintiff to add a defendant. See Cohen v. Levy, 221 Mass. 336, 337, 108 N.E. 1074; McPherson v. Boston Edison Co., 336 Mass. 94, 97, 142 N.E.2d 758. The effect in both cases is that a different defendant is called upon to defend the action. We hold, therefore, that the propriety of allowing the amendment in both cases is governed by the same rules."

For statutory requirements governing amendment of names in Superior Court divorce proceedings, see G.L. c. 208 § 10.

Rule 15(d) provides that the court, upon motion of a party, may allow the party to serve a supplemental pleading setting forth transactions, occurrences, or events postdating the pleading sought to be supplemented. This liberalizes Massachusetts law, which did not allow an amendment to sustain a new cause of action not intended when the writ was drawn. See Church v. Boylston and Woodbury Cafe Co., 218 Mass. 231, 105 N.E. 883 (1914).

Rule 16: Pre-Trial Procedure: Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The timing and extent of discovery;

(6) The preservation and discovery of electronically stored information;

(7) Agreements or proceedings for asserting claims of privilege or of protection as trial preparation material after information is produced;

(8) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

Effective July 1, 1974; amended September 24, 2013, effective January 1, 2014.

Reporter's Notes (2014): The 2014 amendments are the first amendments to Rule 16 since the adoption of the Massachusetts Rules of Civil Procedure in 1973. They were part of a series of amendments concerning discovery of electronically stored information. For background, see the 2014 Reporter's Notes to Rule 26.

Rule 16 has been amended to add three discovery provisions to the listing of considerations at a pre-trial conference: (5) "The timing and extent of discovery;" (6) "The preservation and discovery of electronically stored information;" and (7) "Agreements or proceedings for asserting claims of privilege or of protection as trial preparation material after information is produced." The items previously designated as (5) through (8) have been renumbered as (8) through (11). The new items are consistent with topics added to Rule 16 of the Federal Rules of Civil Procedure in 2006, and are appropriate items for a judge to consider in making a pre-trial order regarding discovery.

Rule 16 conferences that deal with discovery of electronically stored information may be of significant value to the parties and to the court. New item (6) makes specific reference to consideration at the pre-trial conference of matters relating to electronically stored information. Conferences with the court in cases involving discovery of electronically stored information may be particularly appropriate given the complexity and costs involved in electronic discovery.

Various court departments currently require a case management conference and a scheduling order by virtue of Standing Orders or internal rules. The amendments to Rule 16 do not alter the language of Rule 16 that "a court may in its discretion" order a conference. Courts that require case management conferences by virtue of Standing

Orders or internal rules should consider adding specific references to the three items that are now part of Rule 16.

The 2014 amendments also added language to the first sentence of the rule to make clear that a court may order unrepresented parties to appear at a conference. The addition of the reference to unrepresented parties conforms this portion of the first sentence of Rule 16 to a similar amendment to Rule 16 of the Federal Rules of Civil Procedure in 1983.

Reporter's Notes (1973): Although in recent years, the Superior Court has been unable to make consistent systematized use of pre-trial conferences, the device is well-worth preserving, regulating, and encouraging. Coupled with the liberal discovery provisions in the Rules, pre-trial procedure can simplify and expedite every type of litigation. The basic principle of Rule 16, including the trial judge's power to modify the pre-trial order "to prevent manifest injustice," are quite familiar. Gurman v. Stowe-Woodward, Inc., 302 Mass. 442, 444-445, 19 N.E.2d 717, 718 (1939) and cases cited; Mitchell v. Walton Lunch Co., 305 Mass. 76, 80, 25 N.E.2d 151, 154 (1940).

The word "master" as used in Rule 16(5) includes an auditor. See Rule 53(a). The changes in Rule 16(5) from Federal Rule 16(5) are designed to reflect Massachusetts practice. Because an auditor's findings are by their very nature evidence utilizable before a jury (see, e.g., Roth v. Rubin Bros., 344 Mass. 604, 607, 183 N.E.2d 856, 858-859 (1962)), it has not been considered necessary to say so. Rule 16(6) and Rule 16(7), taken from Superior Court Rule 58, are designed to emphasize that agreements about money, in either partial or full resolution of the dispute, are the most valuable by-products of a pre-trial system.

Rule 17: Parties Plaintiff and Defendant: Capacity

(a) **Real Party in Interest**. Except for any action brought under General Laws, chapter 152, section 15, every action shall be prosecuted in the name of the real party in interest. A personal representative, guardian, conservator, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the Commonwealth. An insurer who has paid all or part of a loss may sue in the name of the assured to whose rights it is subrogated. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) **Infants or Incompetent Persons or Incapacitated Persons**. Whenever an infant or incompetent person, or an incapacitated person as defined in G.L. c.190B has a representative, such as a guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person, or incapacitated person as defined in G.L. c.190B. If an infant or incompetent person, or an incapacitated person as defined in G.L. c.190B does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person, or an incapacitated person as defined in G.L. c.190B not otherwise represented in an action or shall make such other order as it deems proper for the protection

Effective July 1, 1974; Amended June 24, 2009, effective July 1, 2009, December 14, 2011 effective January 2, 2012..

Reporter's Notes (2012): The rule is updated to reflect terminology changes introduced by the Massachusetts Uniform Probate Code, G.L. c. 190B.

Reporter's Notes (2009): The 2009 amendments reflect changes resulting from the adoption of the Massachusetts Uniform Probate Code.

Reporter's Notes (1973): Rule 17 is a modified version of Federal Rule 17; the requirement that actions be prosecuted in the name of the real party in interest is new to Massachusetts law. At common law in Massachusetts, the subrogee had no right to sue the tortfeasor in his own name. His rights were considered equitable in nature, entitling him to bring the action only in the insured's name. See Gray v. United States, 77 F.Supp. 869 (D.Mass.1948), reversed on other grounds, 172 F.2d 737 (1st Cir.1949). By statute (G.L. c. 231 § 5), the assignee of a non-negotiable legal chose in action which has been assigned in writing *may* maintain an action thereon in his own name. With several exceptions, Rule 17(a) makes compulsory a suit in the name of the real party in interest. One of the exceptions is not contained in Federal Rule 17: "An insurer who has paid all or part of a loss may sue in the name of the assured to whose right it is subrogated."

The second sentence in Rule 17(a) does not really qualify the first sentence. Individuals such as executors, bailees, trustees, etc. have a "real interest" in the litigation.

The last sentence of Rule 17(a) permits a reasonable time for ratification by, or joinder or substitution of, the real party in interest. It tracks a 1966 amendment to Federal Rule 17(a). This provision is consistent with Massachusetts practice, which allows amendments as to parties (G.L. c. 231 § 51).

Rule 17(b), which copies Federal Rule 17(c) without change, accords with prior Massachusetts law. See G.L. c. 201. Federal Rule 17(b) is omitted from Rule 17 as inapplicable to state practice.

Rule 18: Joinder of Claims and Remedies

(a) **Joinder of Claims**. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, or both, as he has against an opposing party.

(b) **Joinder of Remedies**: Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

Effective July 1, 1974.

Reporter's Notes (1996): Prior to the merger of the District Court Rules into the Massachusetts Rules of Civil Procedure, the District Court version of Rule 18(b) contained no reference to fraudulent conveyances. Under the merged set of rules, the reference to fraudulent conveyances is maintained, but the merger itself does not serve to confer jurisdiction on the District Court which otherwise does not exist. See Rule 83.

Reporter's Notes (1973): Rule 18(a) works a major change in Massachusetts practice. Under prior law, causes of action could be joined only "when they arise out of the same matter" (Mass.G.L. c. 231 §§ 1A, 7 (part sixth)) or if they belong to the same division of actions (G.L. c. 231 § 1; Mass.G.L. c. 231 § 7 (part fifth)). Legal and equitable claims could not be joined in a single action. Although equity rules were more liberal as to joinder, "multifarious" admixture of claims was forbidden. Coughlin v. Coughlin, 312 Mass. 452, 456, 45 N.E.2d 388, 391-392 (1942); Strasnick v. American Wood Products Corp., 319 Mass. 723, 65 N.E.2d 310 (1946). Now all disputed issues between the parties may be resolved in one lawsuit.

Rule 18(b) accords with case law. In litigation under G.L. c. 214 § 3(8), a single bill in equity "to reach and apply property fraudulently conveyed combine[d] in one proceeding matters both of law and equity. The first [was] the establishment of indebtedness by the defendant to the plaintiff. The second [was] the equitable process for collecting the debt out of property fraudulently conveyed." Salvucci v. Sheehan, 349 Mass. 659, 662, 212 N.E.2d 243, 244-245 (1965).

The adoption of 18(b) does not, however, permit the plaintiff to bring a single action (1) to establish liability for a tort and (2) to reach and apply the obligation of an insurance company in satisfaction of the judgment. See G.L. c. 214 § 3(9). A specific prohibition against such telescoping is unnecessary, because G.L. c. 214 § 3(9) prohibits a suit being maintained unless the judgment against the tortfeasor has remained unsatisfied for 30 days; see also Rogan v. Liberty Mutual Insurance Co., 305 Mass. 186, 188, 25 N.E.2d

188, 189 (1940).

Rule 19: Joinder of Persons Needed for Just Adjudication

(a) **Persons to Be Joined if Feasible**. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant.

(b) **Determination by Court Whenever Joinder Not Feasible**. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) **Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) **Exception of Class Actions**. This rule is subject to the provisions of Rule 23.

Effective July 1, 1974.

Reporter's Notes (1973): Rule 19 deals with compulsory joinder of parties. With the exception of the language in Rule 19(a) pertaining to jurisdiction, involuntary plaintiffs and venue, it follows Federal Rule 19.

Rule 19(a) sets out the general rule as to those persons with respect to whom joinder is compulsory. (See Rule 20 as to permissive joinder.) Rule 19 covers, generally, those individuals who under prior Massachusetts practice would be classified as necessary parties or indispensable parties.

Rule 19(b) deals with persons who fall within Rule 19(a) but cannot be made parties. If under the tests set out in Rule 19(b) such an absent person is regarded as indispensable,

the action will be dismissed; otherwise the court may proceed with the parties before it, with judgment obviously binding those parties only.

Rules 19(a) and 19(b) are quite similar to prior equity practice. Eustis Manufacturing Co. v. Saco Brick Co., 198 Mass. 212, 219-220, 84 N.E. 449, 452-453 (1908); Franks v. Markson, 337 Mass. 278, 284, 149 N.E.2d 619, 623 (1958).

Under that practice a court could of its own motion order a cause to stand over in order that an indispensable party might be joined. Sutcliffe v. Cawley, 240 Mass. 231, 239, 132 N.E. 406, 409 (1921). "Whenever the lack of indispensable parties has become manifest the court may dismiss the bill of its own motion." Turner v. United Mineral Lands Corp., 308 Mass. 531, 539, 33 N.E.2d 282, 286-287 (1941). As in federal practice under Rule 19, under Massachusetts equity practice if a person who should join as a plaintiff refused to do so, he would be made a party-defendant. Billings v. Mann, 156 Mass. 203, 205, 30 N.E. 1136, 1137 (1892).

In a few actions at law, prior practice made joinder compulsory. In contract actions, joint obligees were indispensable parties. Thomas v. Benson, 264 Mass. 555, 556, 163 N.E. 181, 182 (1928). However joint obligors were only conditionally necessary parties; failure to join a joint obligor was merely a defect in form, and could be pressed only by a plea in abatement. *Id.* at 556-557, 163 N.E. at 182. The reason for this rule was that each of such persons was liable for the whole amount claimed by the plaintiff.

In personal actions of tort, even though the wrongdoers were joint tortfeasors, the plaintiff could elect between joining them and suing them separately. Thus it was not a ground of abatement that others potentially liable were not served. Donnelly v. Larkin, 327 Mass. 287, 296, 98 N.E.2d 280, 285-286 (1951).

The language of Rule 19(a) will not effect these common law doctrines.

Rule 19(c) is the same as Federal Rule 19(c). It requires a pleading asserting a claim for relief to state the names, if known to the pleader, of any persons described in Rule 19(a) who were not joined and the reasons why they were not joined. The usual reason for non-joinder will be that such person was not subject to the jurisdiction of the court. Before making such allegation the plaintiff should assure himself that the "long-arm" statute (G.L. c. 223A) does not make the absent defendant amenable to process.

Rule 19(d) merely makes Rule 19 subject to the provisions of Rule 23 (Class Actions).

Rule 20: Permissive Joinder of Parties

(a) **Permissive Joinder**. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction,

occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more of the defendants according to their respective liabilities, and the court may issue one or more executions and make such order relative to costs as may be necessary and proper. In any action in which persons not asserting any right to recover jointly join as plaintiffs, and in which the relief sought is not wholly equitable, the entry fee shall be an amount equal to the aggregate of the entry fees which would have been required had separate actions been brought.

(b) **Separate Trials**. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

Amended June 27, 1974, effective July 1, 1974.

Reporter's Notes (1973): Rule 20(a) is the same as Federal Rule 20(a) except for: (1) the deletion of a reference to admiralty law, and (2) the addition of a reference to executions and costs taken from G.L. c. 231, § 4A.

Rule 20(a) changes prior law slightly. G.L. c. 231, § 4A allowed joinder where the rights or liabilities arose out of the same transaction, occurrence, or series of transactions or occurrences. Rule 20(a) adds the requirement, taken from Federal Rule 20(a), that there be a common question of law or fact.

The principal difference between Rule 20(a) and the prior statute is that the latter applied solely to actions at law whereas the former applies to all claims for relief.

Joinder of parties under Rule 20(a) obviously does not affect the substantive rights of the parties involved. For example, Rule 20(a) permits the joinder of a master and his servant. This follows prior law, see Kabatchnick v. Hanover-Elm Building Corp., 331 Mass. 366, 369, 119 N.E.2d 169, 172-173 (1954), but does not however convert the several liability of the master into a joint tort liability with his servant. Id.

Just as the prejudicial operation of Rule 18 (Joinder of Claims and Remedies) can be avoided by the court (Rule 42(b)), so also can embarrassment, delay and expense to a party be avoided by the court, acting under Rule 20(b).

Rule 21: Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative, after hearing, at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Effective July 1, 1974.

Reporter's Notes (1973): Rule 21 embodies prior law: G.L. c. 231, § 4A; §§ 51-54, and adds to Federal Rule 21 the requirement of a hearing before parties may be dropped or added.

Rule 22: Interpleader

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

Effective July 1, 1974.

Reporter's Notes (1973): Rule 20 allows joinder of defendants where it is uncertain which of them is liable. Rule 22 acts as a useful corollary to Rule 20 by making the same free joinder available to the person against whom a claim might otherwise be pressed by several different persons. See 7 Wright & Miller, Federal Practice and Procedure, § 1702.

Rule 22 is identical with Federal Rule 22(1). Federal Rule 22(2) is inappropriate to Massachusetts practice.

Rule 22 removes a number of technical statutory and case-law restrictions under prior law. It avoids the confusion between the so-called strict interpleader (see Gonia v. O'Brion, 223 Mass. 177, 179, 111 N.E. 787, 788 (1916)) and bills in the nature of interpleader (see Savage v. McCauley, 301 Mass. 162, 164, 16 N.E.2d 639, 640 (1938)). It eliminates any requirement that the claims be identical or based upon a common origin or title. Further, it allows the person asking relief to aver that he is not liable in whole or in part to any or all of the claimants. In other words he may plead that he owes no claimant anything; but that if he does, he does not know which. As under prior law (see

Perkins v. Darker, 345 Mass. 763, 764, 186 N.E.2d 607 (1962)), Rule 22 makes the impleader remedy completely available to the plaintiff as well as the defendant, and allows interpleader by way of cross-claim or counterclaim.

Rule 22 does not specifically cover the following case: P sues D; D denies his liability but maintains that if he is liable at all, he may instead be liable to T. Rule 22 does not mention "impleader" in the catalogue of defendant's remedies. The Reporters believe, however, that Rule 20 (Permissive Joinder of Parties) would allow T to be joined as a plaintiff; D could then assert an appropriate claim for interpleader.

Under pre-Rules Massachusetts caselaw, if the party seeking to compel interpleader has incurred a personal liability to either of the other parties, independent of the question between the claimants themselves, interpleader will not lie. Gonia v. O'Brion, supra; National Security Bank of Boston v. Batt, 215 Mass. 489, 102 N.E. 691 (1913). Rule 22 is silent on this point. There is however one federal decision Olivier v. Humble Oil and Refining Co., 225 F.Supp. 536, 539 (D.La.1963), holding that under Federal Rule 22 it is immaterial that the party counterclaiming for interpleader has a so-called independent liability to the plaintiff or that the claims of the parties sought to be interpleaded are independent of the claims of the plaintiff. This same result was reached by a state court construing identical language. See Jersey Insurance Company of New York v. Altieri, 5 N.J.Super. 577, 68 A.2d 852 (1949).

Rule 23: Class Actions

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. The court may require notice of such proposed dismissal or compromise to be given in such manner as the court directs. The court shall require notice to the Massachusetts IOLTA Committee for the purpose set forth in subdivision (e)(3) of this rule.

(d) Orders to Insure Adequate Representation. The court at any stage of an action under this rule may require such security and impose such terms as shall fairly and adequately protect the interests of the class in whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. Whenever the representation appears to the court inadequate fairly to protect the interests of absent parties who may be bound by the judgment, the court may at any time prior to judgment order an amendment of the pleadings, eliminating therefrom all reference to representation of absent persons, and the court shall order entry of judgment in such form as to affect only the parties to the action and those adequately represented.

(e) Disposition of Residual Funds.

(1) "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement that does not create residual funds.

(2) Any order, judgment or approved compromise in a class action certified under this rule that establishes a process for identifying and compensating members of the class may provide for the disbursement of residual funds. In matters where the claims process has been exhausted and residual funds remain, the residual funds shall be disbursed to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons) which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, or to the Massachusetts IOLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of the Commonwealth of Massachusetts.

(3) Where residual funds may remain, no judgment may enter or compromise be approved unless the plaintiff has given notice to the Massachusetts IOLTA Committee for the limited purpose of allowing the committee to be heard on whether it ought to be a recipient of any or all residual funds.

Effective July 1, 1974; amended Nov. 25, 2008, effective January 1, 2009; amended April 24, 2015, effective July 1, 2015.

Reporter's Notes

(2015) This is the second amendment to Rule 23 regarding residual funds in class actions proceedings. The first amendment to Rule 23 in 2008 set forth a definition of residual funds and provided for disbursement of residual funds to nonprofit groups or to the Massachusetts IOLTA Committee for the purpose of promoting access for low income persons to the civil justice system.

This second amendment in 2015 added a sentence to Rule 23(c) and added subdivision (e)(3) requiring the court to order notice to the Massachusetts IOLTA Committee so that it maybe heard on whether it should receive "any or all" residual funds that may remain in a class action after all payments have been made.

(2008) The 2008 amendment, effective January 1, 2009, added Rule 23(e) concerning residual funds in class action proceedings. This amendment was recommended to the Supreme Judicial Court by the Massachusetts IOLTA Committee.

(1996) With the merger of the District Court civil rules into the Mass.R.Civ.P., Rule 23 of the Mass.R.Civ.P. governing class actions is made applicable to District Court proceedings.

(1973) Prior Massachusetts practice in the area of class suits was governed entirely by case law. The requirements for maintaining a class suit in Massachusetts were set out as follows:

"Class bills may be maintained where a few individuals are fairly representative of the legal and equitable rights of a large number who cannot readily be joined as parties. The persons suing as representatives of a class must show by the allegations of their bill that all the persons whom they profess to represent have a common interest in the subject matter of the suit and a right and interest to ask for the same relief against the defendants. It is not essential that the interest of each member of the class be identical in all aspects with that of the plaintiffs. The interest must arise out of a common relationship to a definite wrong. There must be a joint prejudice to all the class whom the plaintiff seeks to represent. The wrong suffered must be subject to redress by some common relief beneficial to all. The plaintiffs must be fairly representative in all essential particulars of the class for which they seek to act.... Mere community of interest in the questions of law or of fact at issue in a controversy or in the kind of relief to be afforded does not go far enough to warrant a class suit. Avoidance of multiplicity of suits is not enough." Spear v. H.V. Greene Co. , 246 Mass. 259, 266-267, 140 N.E. 795, 797-798 (1923). (emphasis supplied)

This rule likewise applies where the action was brought against a class. Thus in Thorn v. Foy , 328 Mass. 337, 338, 103 N.E.2d 416, 417 (1952) a suit was held properly brought against the officers of a labor union, individually and as representatives of the members of the union, because it was found that the members were too numerous to be sued individually and the named defendants adequately represented the entire membership.

Rule 23(a) sets out four prerequisites to a class action. These prerequisites, which are also contained in Federal Rule 23(a) as amended in 1966, closely parallel prior Massachusetts practice as stated in Spear v. H.V. Greene Co. , supra.

"(1) the class is so numerous that joinder of all members is impracticable."

Federal courts have drawn very few lines with respect to how large a class must be in order to allow the class action. Most courts would agree that mere numbers should not be the sole test of practicability of joinder.

"But courts should not be so rigid as to depend upon mere numbers as a guideline on the practicability of joinder; a determination of practicability should depend upon all the circumstances surrounding a case." Demarco v. Edens , 390 F.2d 836, 845 (2d Cir.1968).

The Supreme Judicial Court has never attempted to set any minimum number which would be necessary for a class suit. The opinions use such language as "large number who cannot readily be joined as parties," Spear v. H.V. Greene Co. , 246 Mass. at 266, 140 N.E. at 797; "When the parties interested are very numerous, so that it would be difficult and expensive to bring them all before the court ... the court will not require a strict adherence to the [general] rule [that all interested persons be made parties]." Stevenson v. Austin , 44 Mass. (3 Metc.) 474, 480 (1842).

Rule 23(a)(1) will have little effect on prior Massachusetts practice.

"(2) there are questions of law or fact common to all."

The requirement of common questions of law or fact is the same as that established for joinder under Rule 20 and intervention under Rule 24. It should, however, be noted that Rule 23(a)(2), unlike Rules 20 and 24, does not also require a single transaction or series of transactions or a single occurrence or series of occurrences. However, the language of Rule 23(b) concerning the predominance of the questions of law or fact over questions affecting individual members would imply the need for a single transaction or occurrence or a series of transactions or occurrences.

Rule 23(a)(2) should have little effect on prior Massachusetts law. "The persons suing as representatives of a class must show by the allegations of their bill that all the persons whom they profess to represent have a common interest in the subject matter of the suit and a right and interest to ask for the same relief against the defendants." Spear v. H.V. Greene Co. , 246 Mass. at 266, 140 N.E. at 797.

"(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will adequately protect the interests of the class."

Prerequisite (3) was written into Federal Rule 23 when it was amended in 1966. It should be read with prerequisite (4). Both requirements state the need for the ability of the representatives of the class to protect its interests. The word "typical" does not require

that all members of the class be identically situated. Siegel v. Chicken Delight, Inc. , 271 F.Supp. 722, 726-727 (N.D.Cal.1967). This is similar to the language of the Supreme Judicial Court in the Spear case: "It is not essential that the interest of each member of the class be identical in all respects with that of the plaintiffs. The interest must arise out of a common relationship to a definite wrong." Spear v. H.V. Greene Co. , 246 Mass. at 266, 140 N.E. at 797.

Rule 23(a)(3) and (4) should have little effect on prior Massachusetts law.

Rule 23(b) deletes substantial portions of Federal Rule 23(b) which are unnecessary to state practice. Beyond the four requirements set out in Rule 23(a) for maintaining a class action the only further requirements set out in Rule 23(b) are findings by the Court: (1) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Rule 23(c) and (d) are designed to afford protection to absent members of the class.

Unlike Federal Rule 23, the Massachusetts class action rule does not require the giving of notice to members of the class; nor does it provide to members of the class the opportunity to exclude themselves. Instead Rule 23(d) provides that the court may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. No doubt the trial judge will order the giving of appropriate notice to members of the class, of the commencement of the action where fairness and justice so require, particularly where the failure to give notice may raise subsequent problems of res judicata.

Rule 23.1: Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified by oath and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law from one who was a stockholder or member at such time. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may

not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Effective July 1, 1974.

Reporter's Notes (1996): With the merger of the District Court civil rules into the Mass.R.Civ.P., Rule 23.1 of the Mass.R.Civ.P. governing shareholder derivative actions is made applicable to District Court proceedings.

Reporters' Notes (1973): Rule 23.1 with some minor changes is the same as Federal Rule 23.1. Prior to the 1966 amendments to the federal rules, Federal Rule 23.1 was part of Federal Rule 28, "Class Actions" (Rule 23(b)). The 1966 change was effected because derivative suits are not class actions and have distinctive aspects which warrant treatment in a separate rule. A derivative suit is brought on behalf of a corporation or other association for a wrong done to the corporation or association. The corporation is an indispensable party in a derivative suit. Turner v. United Mineral Lands Corp., 308 Mass. 531, 538-539, 33 N.E.2d 282, 286-287 (1941). It is joined as a party defendant. While the shareholder controls the action, any recovery is for the corporation. Shaw v. Harding, 306 Mass. 441, 448, 28 N.E.2d 469, 473 (1940). The plaintiff has no direct or personal interest in the suit, except as the value of his stock might be enhanced by recovery by the corporation. The bill cannot be maintained to enforce any personal right of the plaintiff. Id.

A class action, on the other hand, is brought to redress a wrong committed directly against the members of the class. It may be maintained where a few individuals are fairly representative of the legal and equitable rights of a large number of individuals who cannot readily be joined as parties. Spear v. H.V. Greene Co., 246 Mass. 259, 266, 140 N.E. 795, 797 (1928). Thus if an action is brought by shareholders against the directors of the corporation for mismanagement, the action is derivative because the harm is directly to the corporation and only indirectly to the shareholders. If, however, an action is brought by the shareholders against the directors to compel the payment of dividends arbitrarily withheld, the action would be in the nature of a class suit because the harm is directly to the shareholders. cf. Fernald v. Frank Ridlon Co., 246 Mass. 64, 140 N.E. 421 (1928).

Rule 23.1 makes a few minor changes in Federal Rule 23.1. The language of Federal Rule 23.1 pertaining to the conferring of jurisdiction is deleted as inapplicable to state practice. Also, Rule 23.1 adds the words "by oath" to the verification requirement. It is hoped that this language will tend to discourage "strike suits" which suits are brought primarily for the purpose of coercing "corporate managers to settle worthless claims in

order to get rid of them." Surowitz v. Hilton Hotels Corporation, 383 U.S. 363, 86 S.Ct. 845, 15 L.Ed.2d 807 (1966).

Rule 23.1 includes the contemporaneous-ownership-of-stock requirement of Federal Rule 23.1. The purpose of this requirement is to prevent an individual from purchasing stock solely for the purpose of maintaining a derivative suit with the hope of coercing the corporate managers to make a personal settlement. Massachusetts, by statute, requires contemporaneous-ownership-of- stock with respect to derivative actions against the corporation's stockholders, directors or officers. G.L. c. 156B, s. 46. Rule 23.1 broadens the requirement of G.L. c. 156B, s. 46, making it applicable in all derivative actions rather than merely those actions against the corporation's stockholders, directors or officers. The language "from one who was a stockholder at such time" was added to Rule 23.1 to bring it in harmony with G.L. c. 156B, s. 46, and to make clear that a person receiving stock under a will or by intestacy cannot maintain a particular derivative suit unless the decedent could have done so prior to death.

Before a shareholder can maintain a derivative suit in Massachusetts he must first make a demand upon the corporation's board of directors for action, unless such a demand would be futile because a majority of the directors are not disinterested. S. Solomont & Sons Trust, Inc. v. New England Theatres Operating Corporation, 326 Mass. 99, 113, 93 N.E.2d 241, 248 (1950). If the board is thus disqualified, or if, after such a demand, the directors refuse to act, the shareholder must make demand upon the corporate shareholders, unless such demand would be futile because a majority of them are not disinterested. Most of the cases decided subsequent to Solomont, applying this principle, arose in the federal courts. Pomerantz v. Clark, 101 F.Supp. 341, 344, 346 (D.Mass.1951), held, applying Massachusetts law that the Solomont requirements must usually be satisfied no matter how many and how scattered were the corporation's shareholders. This view was, by dicta, subsequently repudiated in Levitt v. Johnson, 334 F.2d 815, 818-819 (1st Cir.1964). See also In re Kauffman Mutual Fund Actions, 479 F.2d 257, 263-264 (1st Cir.1973).

While quite similar, the requirements of Solomont go further than those imposed by Rule 23.1. Solomont held that a vote of a majority of the shareholders of a corporation, undominated and uncontrolled, acting reasonably and in good faith, can bar the bringing of a derivative suit by a minority shareholder or shareholders, regardless of the nature of the cause of action. 326 Mass. at 114-115, 93 N.E.2d at 248-249. The rationale is that from a business viewpoint it is not always best to insist upon all of one's legal rights; and since honest and intelligent men differ as to business policy, the will of the majority, acting fairly, should control. Halprin v. Babbit, 303 F.2d 138 (1st Cir.1962), applying Massachusetts law, held that if, after a demand upon the shareholders, the shareholders fail to act, the minority shareholder may proceed with the action. In other words, under the Solomont rule, the minority shareholder does not need the express

approval of the majority of the shareholders in order to bring the action. Inaction on their part is sufficient.

The Advisory Committee believes that the holding of Solomont is not repealed by implication by Rule 23.1 and that a majority of the shareholders, undominated and uncontrolled, acting reasonably and in good faith, can bar the bringing of a derivative suit.

Rule 23.2: Actions Relating to Unincorporated Associations

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d). Further, the provisions of Rule 23(c), concerning dismissal or compromise of the action are applicable to this Rule.

Effective July 1, 1974.

Reporter's Notes (1996): With the merger of the District Court civil rules into the Mass.R.Civ.P., Rule 23.2 of the Mass.R.Civ.P. governing actions relating to unincorporated associations is made applicable to District Court proceedings.

Reporters' Notes (1973): Rule 23.2 is substantially the same as Federal Rule 23.2, the only difference being the references to Rule 28. Federal Rule 23.2 was added in 1966 in conjunction with the 1966 amendment completely rewriting and revising Federal Rule 23 and also adding Federal Rule 23.1 (derivative actions).

The Advisory Committee's notes to Federal Rule 28.2 read as follows:

"Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been to give 'entity treatment' to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b).... Rule 23.2 deals separately with these actions, referring where appropriate to Rule 23."

Massachusetts practice permits individuals to sue or be sued in a representative capacity on behalf of an association, such as a labor union, when it is made to appear that the individuals represent the group. Leonard v. Eastern Mass. St. Ry. Co., 335 Mass. 308, 140 N.E.2d 187 (1957) (representative suit by labor union); Thorn v. Foy, 328 Mass. 337, 103 N.E.2d 416 (1952) (representative suit against officers of labor union). Where such an action is brought, the unincorporated association should not be described as a party to the suit. Donahue v. Kenney, 327 Mass. 409, 99 N.E.2d 155 (1951).

Rule 23.2 does not change the rule in Massachusetts that with some statutory exceptions (i.e., suits against certain voluntary associations and business trusts - G.L. c. 182, s. 6) unincorporated associations do not have the capacity to sue or be sued.

In view of Rule 23, it may appear that Rule 23.2 is redundant. It is not entirely clear, however, that an action by or against representatives of an unincorporated association is technically a class action. Rule 23.2 emphasizes that whether or not such representative suits are class actions, they are maintainable. The protective provisions of Rule 23, namely sections (c) and (d) are incorporated into Rule 23.2.

Rule 24: Intervention

(a) **Intervention of Right**. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the Commonwealth confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive Intervention**. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the Commonwealth confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure**. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

(d) **Intervention by the Attorney General**. When the constitutionality of an act of the legislature or the constitutionality or validity of an ordinance of any city or the by-law of any town is drawn in question in any action to which the Commonwealth or an officer, agency, or employee thereof is not a party, the party asserting the unconstitutionality of the act or the unconstitutionality or invalidity of the ordinance or by-law shall notify the attorney general within sufficient time to afford him an opportunity to intervene.

Effective July 1, 1974.

Reporters' Notes (1973): Rule 24(a), with the exception of the substitution of "Commonwealth" for the "United States" is identical to Federal Rule 24(a). It permits the intervention of a party as a matter of tight in two instances: (1) where permitted by statute and (2) where the disposition of the action may as a practical matter impair or impede the applicant's ability to protect his claimed interest, unless such interest is adequately represented by existing parties.

Prior to a 1966 amendment to Federal Rule 24, apart from statutory authorization, intervention was allowed as a matter of right only upon a showing (1) that the applicant might be bound by a judgment in the action, and that existing parties would inadequately represent his interests; or (2) that the applicant would be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the court.

The Advisory Committee on the Federal Rules felt that the "res judicata" or "fund" requirements of the former Federal Rule 24(a) were unnecessarily restrictive. If the interests of an absentee who would be substantially affected in A practical sense by the determination are not adequately represented by existing parties, he should, as a matter of right, be allowed to intervene

Its amended version of Federal Rule 24(a) coordinates more closely intervention with joinder (Rule 19) and class actions (Rule 23). The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(1) unless his interest is already adequately represented by existing parties.

Adequacy of representation under Rule 24(a) is not confined to formal representation like that provided by a trustee for his beneficiary or a representative party in a class action for a member of the class. Ford Motor Co. v. Bisanz Bros. Inc., 249 F.2d 22 (8th Cir.1957) presents a good illustration of practical representation and of the wisdom of eliminating the res judicata requirement of the former version of Federal Rule 24(a). Ford involved an action by property owners against a railroad company to enjoin the operation of freight cars on certain trackage. Ford, which owned an assembly plant which was serviced by this particular trackage, sought to intervene under Federal Rule 24(a). The United States Court of Appeals vacated an order of the District Court and allowed Ford to intervene. On the argument of plaintiff that Ford should not be allowed to intervene because it would not be bound by any judgment against the railroad, the Court held that a judgment against the railroad would have the practical effect of denying Ford a service essential to its operation. As amended, Rule 24(a) codifies this reasoning.

Apart from a few isolated situations covered by statute (see G.L. c. 12, s. 8; G.L. c. 149, s. 29; G.L. c. 151D, s. 3; G.L. c. 241, s. 6), intervention as a matter of right did not e)dst under prior Massachusetts practice.

A person could intervene in Massachusetts only upon a showing that he had a substantial interest in the subject matter of the litigation (Check v. Kaplan, 280 Mass.

170, 178, 182 N.E. 305, 308 (1932)). In all cases a motion to intervene was addressed to the sound judicial discretion of the presiding judge; his decision would not be reversed unless it clearly appeared that there has been an abuse of such discretion. Haverhill v. Di Burro, 337 Mass. 230, 285, 236, 148 N.E.2d 642, 645, 646 (1958).

Rule 24(b) provides for permissive intervention when allowed by statute or where an applicant's claim or defense and the main action have a question of law or fact in common. The purpose of Rule 24(b) is to facilitate the disposal in one action of claims involving common questions of law or fact, thus avoiding both court congestion and undue delay and expense to all parties. On the other hand, one could argue that intervention may unduly delay or prejudice the adjudication of the right of the original parties.

Rule 24(b) clearly alters Massachusetts practice which required as a condition for the allowance of intervention a showing by the applicant of a substantial interest in the subject matter of the litigation. See Check v. Kaplan, supra.

Rule 24(c) regulates the form of the prospective intervenor's notice to the parties.

Under Rule 24(d), the obligation to notify the attorney general that the constitutionality of an act of the legislature or of a municipality is being questioned in the action is placed upon the party asserting the unconstitutionality of the act (or the unconstitutionality or invalidity of an ordinance or bylaw) rather than, as in Federal Rule 24(c), on the court.

Rule 25: Substitution of Parties

(a) **Death**.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the representative of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. Unless the motion for substitution is made within one year after the date of approval of the bond of the representative of the deceased party, the action shall, upon notice and hearing, be dismissed unless the failure of the surviving party to move for substitution was the result of excusable neglect. If the court finds that the representative of the deceased party has failed within a reasonable period of time after the date of the approval of his bond to notify in writing the surviving party of the decedent's death and to file a suggestion of death upon the record it shall find excusable neglect for purposes of this rule and Rule 6(b).

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or

only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) **Incompetency or Incapacity**. If a party becomes incompetent or incapacitated as defined in G.L. c.190B, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) **Transfer of Interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) **Public Officers; Death or Separation From Office**.

(1) When a public officer is a party to an action 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 sues or is sued 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.

Effective July 1, 1974; Amended June 24, 2009, effective July 1, 2009.

Reporter's Notes (2009): The 2009 amendments reflect changes resulting from the adoption of the Massachusetts Uniform Probate Code.

Reporters' Notes (1973): Rule 25(a) deals with the substitution of the proper parties in the event of the death of any party. Rule 25(a)(1) treats the situation where the claim for or against the deceased party survives the death. Rule 25(a) is not limited to the situation involving the death of a sole plaintiff whose claim survives or a sole defendant against whom the claim survives. Thus if P sues D(1) and D(2) on a claim which survives a defendant's death then upon the death of 1)(1), his representative may be substituted under Rule 25(a)(1).

In the case of death of one of several defendants, where the claim does not survive against the deceased defendant, Rule 25(a)(2) allows the action to continue against the remaining defendants. Thus if P sued D(1) and D(2) on a claim which does not survive a defendant's death, then upon the death of D(1), the action will continue against D(2).

Under prior law, substitution of the representative of a deceased party could occur in one of two ways: (1) the representative could voluntarily appear; or (2) the surviving party could obtain a court citation requiring the representative to appear and assume the

prosecution or defense of the action. Rule 25(a)(1) supplants the citation procedure with the motion for substitution. If it is the representative of the deceased party who seeks substitution, he must give notice to the other parties as provided in Rule 5. If a surviving party seeks the substitution, service must be made upon the representative in the manner prescribed by Rule 4, because the representative is not yet a party.

Rule 25(a)(1) differs in several respects from Federal Rule 25(a)(2). The federal rule requires that the motion for substitution take place within ninety days after the death is suggested upon the record; the Massachusetts rule allows the motion to be made within one year after the date of approval of the bond of the representative of the deceased party. This period is more consistent with prior Massachusetts law for issuance of a citation. Prior law provided for one year from the time the representative had given bond whereas Rule 25(a)(1) provides for one year from the approval of the bond.

Rule 25(a)(1) allows a dismissal of the action upon notice and hearing if the motion for substitution is not timely made, unless the failure of the surviving party to make the motion was the result of excusable neglect. Failure on the part of the decedent's representative to notify the surviving party within a reasonable time from the approval of the bond and to file a suggestion of death upon the record requires a finding of excusable neglect.

Rule 25(b) does not alter prior practice. Neither does Rule 25(c). See Henri Peladeau Lte. v. Fred Gillespie Lumber Co., 285 Mass. 10, 13-14, 188 N.E. 380, 381-382 (1933); Shapiro v. McCarthy, 279 Mass. 425, 428, 181 N.E. 842, 843 (1932).

Rule 25(d) changes prior practice slightly by allowing substitution of a successor officer in place of the officer against whom the action was originally brought. See Knights v. Treasurer & Receiver General, 236 Mass. 336, 341, 342, 128 N.E. 637, 639 (1920).

Rule 26: General Provisions Governing Discovery

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods except as otherwise provided in Rule 30(a) and Rule 30A(a), (b): depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise, or unless otherwise provided in these rules, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or

defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials.

(A) Privilege Log. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as material in anticipation of litigation or for trial, the party shall make the claim expressly and, without revealing information that is privileged or protected, shall prepare a privilege log containing the following information: the respective author(s) and sender(s) if different; the recipient(s); the date and type of document, written communication or thing not produced; and in general terms, the subject matter of the withheld information. By written agreement of the party seeking the withheld information and the party holding the information or by court order, a privilege log need not be prepared or may be limited to certain documents, written communications, or things.

(B) Information mistakenly produced; claim of privilege. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party shall promptly return, sequester, or destroy the specified information and any copies it has; shall not use or disclose the information until the claim is resolved; shall take reasonable steps to retrieve the information if the party disclosed

it before being notified; and may promptly present the information to the court under Trial Court Rule VIII, Uniform Rules on Impoundment Procedure, for a determination of the claim. The producing party shall preserve the information until the claim is resolved.

In resolving any such claim, the court should determine whether:

(i) the disclosure was inadvertent;

(ii) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(iii) the holder promptly took reasonable steps to rectify the error

(C) Effect of a ruling. If the court, following such procedure, or pursuant to an order under Rule 26(f)(3), upholds the privilege or protection in a written order, the disclosure shall not be deemed a waiver in the matter before the court or in any other proceeding.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county or judicial district, as the case may be, where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time, place, or manner; or the sharing of costs; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Factors bearing on the decision whether discovery imposes an undue burden or expense may include the following:

(1) whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive;

(2) whether the discovery sought is unreasonably cumulative or duplicative; and

(3) whether the likely burden or expense of the proposed discovery outweighs the likely benefit of its receipt, taking into account the parties' relative access to the information, the

amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) Electronically Stored Information.

(1) Definition.

"Inaccessible electronically stored information" means electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.

(2) Electronically Stored Information Conferences.

(A) Conference as of right. Upon the written request of any party made no later than 90 days after the service of the first responsive pleading by any defendant, the parties shall confer regarding electronically stored information. Such request shall be served on each

party that has appeared, but it shall not be filed with the court. The conference shall be held as soon as practicable but no later than 30 days from the date of service of the request.

(B) Conference by agreement of the parties. At any time more than 90 days after the service of the first responsive pleading, any party may serve on each party that has appeared a request that all parties confer regarding electronically stored information. Such request shall not be filed with the court. If within 30 days after the request all parties do not agree to confer, any party may move that the court conduct a conference pursuant to Rule 16 regarding electronically stored information.

(C) Purpose of electronically stored information conference among the parties. The purpose of an electronically stored information conference is for the parties to develop a plan relating to the discovery of electronically stored information. Within 14 days after such conference the parties shall file with the court the plan and a statement concerning any issues upon which the parties cannot agree. At any electronically stored information conference the parties shall discuss:

(i) any issues relating to preservation of discoverable information;

(ii) the form in which each type of the information will be produced;

(iii) what metadata, if any, shall be produced;

(iv) the time within which the information will be produced;

(v) the method for asserting or preserving claims of privilege or of protection of trial preparation materials, including whether such claims may be asserted after production;

(vi) the method for asserting or preserving confidential and proprietary status of information either of a party or a person not a party to the proceeding;

(vii) whether allocation among the parties of the expense of production 1s appropriate, and,

(viii) any other issue related to the discovery of electronically stored information.

(3) Electronically Stored Information Orders. The court may enter an order governing the discovery of electronically stored information pursuant to any plan referred to in subparagraph (2)(C), or following a Rule 16 conference, or upon motion of a party or stipulation of the parties, or sua sponte, after notice to the parties. Any such order may address:

(A) whether discovery of the information is reasonably likely to be sought in the proceeding;

(B) preservation of the information;

(C) the form in which each type of the information is to be produced;

(D) what metadata, if any, shall be produced;

(E) the time within which the information is to be produced;

(F) the permissible scope of discovery of the information;

(G) the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation material after production;

(H) the method for asserting or preserving confidentiality and the proprietary status of information relating to a party or a person not a party to the proceeding;

(I) allocation of the expense of production; and

(J) any other issue relating to the discovery of the information.

(4) Limitations on Electronically Stored Information Discovery.

(A) A party may object to the discovery of inaccessible electronically stored information, and any such objection shall specify the reason that such discovery is inaccessible.

(B) On motion to compel or for a protective order relating to the discovery of electronically stored information, a party claiming inaccessibility bears the burden of showing inaccessibility.

(C) The court may order discovery of inaccessible electronically stored information if the party requesting discovery shows that the likely benefit of its receipt outweighs the likely burden of its production, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(D) The court may set conditions for the discovery of inaccessible electronically stored information, including allocation of the expense of discovery.

(E) The court may limit the frequency or extent of electronically stored information discovery, even from an accessible source, in the interests of justice. Factors bearing on this decision include the following:

(i) whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive;

(ii) whether the discovery sought is unreasonably cumulative or duplicative;

(iii) whether the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or

(iv) whether the likely burden or expense of the proposed discovery outweighs the likely benefit.

Amended December 16, 1980, effective January 1, 1981; amended effective July 1, 1996; amended February 27, 2008, effective April 1, 2008; amended September 24, 2013, effective January 1, 2014; amended May 31, 2016, effective July 1, 2016.

Reporter's Notes

Reporter's Notes--2016

At the request of the Rules Committee of the Supreme Judicial Court, the Standing Advisory Committee on the Massachusetts Rules of Civil and Appellate Procedure ("Standing Advisory Committee") considered possible changes to the Massachusetts discovery rules that were based on amendments to the federal discovery rules. The proposed amendments to the Massachusetts discovery rules were intended to address the burdens of discovery that have been the subject of significant debate across the country over the past few years.

There were three proposed changes involving the Massachusetts discovery rules, all taken from amendments to the federal discovery rules.

The first proposed change to Rule 26(b) would have involved the scope of discovery by deleting the language that discovery must be "relevant to the subject matter involved" in the action. The proposal would have added in place of the deleted language that discovery must be relevant to a party's claim or defense. This language was drawn from a 2000 amendment to Rule 26 of the Federal Rules of Civil Procedure refining the scope of discovery.

The second proposed change to Rule 26(b) would have adopted the principle of proportionality for discovery requests--i.e., discovery should be "proportional to the needs of the case." This proposed amendment would have adopted the principle of proportionality as set forth in amendments to the Federal Rules of Civil Procedure that were effective in 2015. The proposed rule listed the factors that were to be taken into account in determining whether a discovery request was proportional to the needs of a case: "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

The third proposed change would have deleted the language in Rule 26(b)(1) that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." In its place, the proposal would have added language that information "need not be admissible in evidence to be discoverable."

The Standing Advisory Committee reviewed the many comments submitted by both lawyers and judges after the proposal was published for public comment and voted not to recommend to the Supreme Judicial Court adoption of the three changes to the discovery

rules. The comments reflected significant opposition to the proposed changes and described them as unnecessary and inadvisable at the present time. The principal objection to the amendments by the Standing Advisory Committee was based on the perception by many Committee members of drawbacks and unintended consequences of imposing the federal changes on the Massachusetts trial courts, as well as the newness of the federal changes. Most Committee members were in favor of a "wait and see" approach that would allow review of how the federal amendments affect litigants and civil litigation prior to considering whether similar amendments should be adopted in Massachusetts.

The Standing Advisory Committee also prepared draft language for consideration by the Supreme Judicial Court that alluded to proportionality in discovery, not in the context of the scope of discovery, but in the context of a court's decision to grant a protective order involving discovery under Rule 26(c). The Standing Advisory Committee referred to this as "compromise" language in the event that the Supreme Judicial Court did not accept the Standing Advisory Committee's recommendation not to change the Massachusetts discovery rules, at least until there is sufficient experience under the federal amendments. It is this compromise language that the Supreme Judicial Court adopted in 2016.

The amendment to the protective order language of Rule 26(c) lists factors similar to those that are relevant to a court's decision to limit the discovery of electronically stored information under Rule 26(f)(4)(E). These factors are:

> (1) whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive;
>
> (2) whether the discovery sought is unreasonably cumulative or duplicative; and
>
> (3) whether the likely burden or expense of the proposed discovery outweighs the likely benefit of its receipt, taking into account the parties' relative access to the information, the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

Under Rule 26(f)(4)(E)(iii), a relevant factor in limiting electronic discovery is "whether the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought." This factor has been omitted from the listing of factors in the 2016 amendment to Rule 26(c).

The addition of these factors to Rule 26(c) should not result in any significant change to Massachusetts practice. The amendment confirms the existing authority of a trial judge in determining whether to grant a protective order.

(2014) Background to 2014 Amendments

The 2014 amendments to Rule 26 were part of a series of amendments concerning discovery of electronically stored information. Amendments have been made to Rules 16, 26, 34, 37, and 45.

For a number of years, the Standing Advisory Committee on the Rules of Civil Procedure of the Supreme Judicial Court (Standing Advisory Committee) had been considering the amendments to Federal Rules of Civil Procedure that dealt with discovery of electronically stored information in litigation.

The driving force behind the decision to consider rules for electronic discovery in Massachusetts is the staggering growth of information in electronic form today. In preparing draft electronic discovery rules, a subcommittee of the Standing Advisory Committee drew on two primary sources: the 2006 amendments to the Federal Rules of Civil Procedure that addressed electronically stored information and the 2007 Uniform Rules Relating to the Discovery of Electronically Stored Information (National Conference of Commissioners on Uniform State Laws). Helpful comments on the background that fueled the decision to amend the Federal Rules and to adopt Uniform Rules can be found in the Advisory Committee Notes to the 2006 Federal Rules amendments and the Comments to the Uniform Rules.

The following excerpts from the Prefatory Note that accompanied the Uniform Rules illustrate the scope of the problems created by electronically stored information and the litigation process. Footnotes from the following excerpts have been deleted.

"With very few exceptions, when the state rules and statutes concerning discovery in civil cases were promulgated and adopted, information was contained in documents in paper form. Those documents were kept in file folders, filing cabinets, and in boxes placed in warehouses. When a person, business or governmental entity decided that a document was no longer needed and could be destroyed, the document was burned or shredded and that was the end of the matter. There was rarely an argument about sifting through the ashes or shredded material to reconstruct a memo that had been sent.

"In today's business and governmental world, paper is a thing long past. By some estimates, 93 percent or more of corporate information is being stored in some sort of digital or electronic format. This difference in storage medium for information creates enormous problems for a discovery process created when there was only paper. Principal among these differences is the sheer volume of information in electronic form, the virtually unlimited places where the information may appear, and the dynamic nature of the information. These differences are well documented in the report of the Advisory Committee on the Federal Rules of Civil Procedure (Civil Rules Advisory Committee). The Civil Rules Advisory Committee recommended adoption of new Federal Rules to accommodate the differences:

The Manual for Complex Litigation (4th) illustrates the problems that can arise with electronically stored information.

The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes is the equivalent of 720 typewritten pages of plain text. A CD-ROM with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes; each terabyte represents the equivalent of 500 billion typewritten pages of plain text.

Electronically stored information may exist in dynamic databases that do not correspond to hard copy materials. Electronic information, unlike words on paper, is dynamic. The ordinary operation of computers - including the simple act of turning a computer on and off or accessing a particular file - can alter or destroy electronically stored information, and computer systems automatically discard or overwrite as part of their routine operation. Computers often automatically create information without the operator's direction or awareness, a feature with no direct counterpart in hard copy materials. Electronically stored information may be "deleted" yet continue to exist, but in forms difficult to locate, retrieve or search. Electronic data, unlike paper, may be incomprehensible when separated from the system that created it. The distinctive features of electronic discovery often increase the expense and burden of discovery."

After making a preliminary decision to move forward with a recommendation to adopt rules on electronic discovery, the Standing Advisory Committee also decided that it would be preferable to integrate any changes dealing with electronic discovery directly into the relevant existing rules of the Massachusetts Rules of Civil Procedure and rejected the alternative of promulgating a separate set of rules that would govern electronic discovery.

The Committee also discussed whether electronic discovery rules should be applicable to all Trial Court Departments or should be limited to those courts that regularly heard "larger" civil cases where the costs, time associated with, and burdens of, electronic discovery were perceived to be significant. The Committee ultimately decided that electronic discovery was a matter of concern in all courts of the Commonwealth, and concluded that the electronic discovery rules should be applicable to all trial courts in Massachusetts, and not be limited to courts such as the Superior Court.

The Standing Advisory Committee believes that the proposed amendments to the Massachusetts Rules of Civil Procedure reflect the goals that were identified in the Prefatory Note to the Uniform Rules describing the 2006 amendments to the Federal Rules of Civil Procedure: "to (1) provide early attention to electronic discovery issues, (2) provide better management of discovery into electronically stored information, (3) set

out a procedure for assertions of privilege after production, (4) clarify the application of the rules relating to interrogatories and requests for production of documents to electronically stored information, and (5) clarify the application of the sanctions rules to electronically stored information."

There is a danger in attempting to describe "key" or "major" provisions of rules changes, since any significant change in a rule has the potential to change the dynamic of litigation. But it is fair to say that a major focus of the Committee charged with recommending the 2014 amendments was crafting a process: (1) by which the parties, and the court if necessary, deal with electronic discovery early in the litigation, including the format for production of electronically stored information; (2) that addresses how to handle electronically stored information that is "inaccessible;" (3) that recognizes that privileged information may be inadvertently disclosed in the context of electronic discovery and sets forth a remedy for such disclosure; and (4) that provides protection where electronically stored information is lost by virtue of the "good-faith operation of an electronic information system." These matters are all addressed in the Reporter's Notes that accompany the 2014 amendments.

The rules governing electronic discovery apply in all courts and in all proceedings governed by the Massachusetts Rules of Civil Procedure. However, a particular department of the Trial Court may consider whether supplemental rules or standing orders that address special needs of the department, including considerations common to self-represented litigants, would be appropriate. Of course, any departmental rule or standing order regarding electronic discovery may not be "inconsistent with" the provisions of the Massachusetts Rules of Civil Procedure. Mass. R. Civ. P. 83. See Sullivan v. Iantosca, 409 Mass. 796 (1991).

The 2014 Amendments

The 2014 amendments relating to electronically stored information have resulted in changes to Rule 26(b) and (f).

Rule 26(b).

The existing paragraph that had constituted Rule 26(b)(5) ("Claims of Privilege or Protection of Trial Preparation Materials: Privilege Log") was designated as 26(b)(5)(A), with no changes made to the text. Simultaneously, new provisions were added that have been designated as 26(b)(5)(B) and (C) to deal with information that was mistakenly produced in discovery and subject to a claim of privilege or protection.

The provisions of the first paragraph of Rule 26(b)(5)(B) were adapted from Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure. The provisions of the second paragraph of Rule 26(b)(5)(B) and Rule 26(b)(5)(C) were adapted from Rule 502 of the Federal Rules of Evidence. The language addresses concerns that have been raised about

inadvertent waiver of a privilege or claim of protection for trial-preparation material that may result from production of materials in connection with discovery. The problem has become particularly acute in light of the increased likelihood that privileged and protected material can easily be inadvertently produced in discovery where the materials are embedded in voluminous material in electronic format that has been turned over in discovery. But the language of the rule is not restricted to privilege or protection in connection with electronically stored information.

The Standing Advisory Committee decided that an appropriate place to add "clawback" provisions to the Massachusetts Rules was in Rule 26(b)(5), which prior to the 2014 amendment, dealt with privilege and privilege logs. A simultaneous amendment to Mass. R. Civ. P. 16 in 2014 also added this topic to the list of items to be discussed at a pretrial conference.

The Comment to Rule 9 of the Uniform Rules Relating to the Discovery of Electronically Stored Information aptly summarizes the scope of the problem as follows: "The risk of privilege waiver and the work necessary to avoid it add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver and the time and effort to avoid it can increase substantially because of the volume of electronically stored information and the difficulty of ensuring that all information to be produced has in fact been reviewed. This rule provides a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery and, if the claim is contested, permits any party that received the information to present the matter to the court for resolution ...."

The Massachusetts version of the "clawback" rule provides that a party may present the information to the court for resolution pursuant to the provisions of the Uniform Rules on Impoundment Procedure, Trial Court Rule VIII. The cognate language in the federal rules uses "under seal" terminology that the Standing Advisory Committee thought to be less appropriate under Massachusetts practice.

Although Rule 26(b)(5)(B) sets forth a "clawback" provision, there is nothing in the rule that precludes the parties from modifying the procedures set forth in the rule to deal with information within the scope of a privilege or protection.

The language of Rule 26(b)(5)(C) provides that if the procedure is used and a court enters a written order upholding the privilege or protection, "the disclosure shall not be deemed a waiver in the matter before the court or in any other proceeding." Such an order is necessary to avoid a waiver of privilege or protection as to non-parties.

Rule 26(c).

Rule 26(c) includes a listing of types of protective orders that a court may enter. Item (2) in the list provides for an order that discovery "be had only on specified terms and

conditions, including a designation of the time, place, or manner; or the sharing of costs." The reference to "manner" would, for example, permit an order that discovery be provided on a compact disc. The reference to "sharing of costs" makes clear that the court may order sharing of costs in light of the expenses associated with electronic discovery.

Rule 26(f).

Rule 26(f) is new and deals with conferences regarding electronically stored information.

The definition set forth in Rule 26(f)(1) that the term "inaccessible electronically stored information" is "electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost" is taken from Federal Rule 26(b)(2)(B).

Unlike the Federal Rules of Civil Procedure and the Uniform Rules Relating to the Discovery of Electronically Stored Information, the Massachusetts version of Rule 26(f) does not require a conference between the parties as a matter of course (sometimes referred to as a "meet and confer" conference, although a telephonic conference may be permissible). The Massachusetts version, on the contrary, is a recognition that courts in Massachusetts may not necessarily be set up to provide in all instances a right to a conference with the judge as a matter of course in all litigation at the early stages of litigation.

The approach taken by Rule 26(f), however, recognizes that a conference between the parties at the early stages of litigation will often be helpful where there may be discovery of electronically stored information. Thus, the Massachusetts rule has been drafted to encourage a meaningful conference between the parties to deal with electronically stored information.

The Massachusetts version is an attempt to foster communication between counsel on issues of electronic discovery in a court environment that is not set up, as is the case in the federal courts, to provide individual conferences or individual court management of litigation in all instances. A similar approach that did not adopt the federal model in full can be seen in the "Guidelines For State Trial Courts Regarding Discovery of Electronically-Stored Information," approved by the Conference of Chief Justices, August 2006 (available on the Internet at: http://ncsc.contentdm.oclc.org/utils/getdownloaditem/collection/civil/id/56/filename/57.pdf/mapsto/pdf. See generally, Guideline 3 and the Comments that accompany Guideline 3.

Conference as of right. Under Rule 26(f)(2)(A), a party has a right to demand a conference with the other party by serving a written request for a conference "no later than 90 days after the service of the first responsive pleading" of a defendant. The term "pleading" as used in this rule is intended to reflect the definition of "pleading" as set

forth in Rule 7(a). Thus, an answer of a defendant would be a pleading that would trigger the right to serve a request for a conference, whereas a motion to dismiss would not. The rule specifically provides that the request for a conference not be filed with the clerk's office, in an attempt not to overburden an already-beleaguered court system with additional filings. The conference must be held no later than thirty days from the date a party served the request.

Although the rule itself does not define the term "conference," the parties should not feel that they are required to meet in person. A conference by telephone or through electronic communication is satisfactory.

Conference by agreement. If there has been no request for a conference as of right within the 90-day period, Rule 26(f)(2)(B) allows a party to request a conference at a later point. Such a request should not be filed with the clerk's office. If the other parties to the case do not agree to such a conference, a party desiring a conference may move that the court conduct a conference under the provisions of Rule 16 to deal with matters relating to electronically stored information.

Purpose of conference; plan. Rule 26(f)(2)(C) sets forth the purpose of the conference, whether occurring as of right or by agreement of the parties - to develop a plan that relates to discovery of electronically stored information. The rule sets forth a variety of topics that must be discussed at the conference, adapted in part from Rule 3 of the Uniform Rules Relating to the Discovery of Electronically Stored Information.

The parties must discuss at the conference the preservation of electronically stored information (see item (i), "any issues relating to preservation of discoverable information"). Given the practice that exists in many organizations of deleting or disposing of electronic files after a set period of time, discussion of preservation may serve to avoid later disputes about the availability and expense of retrieving electronic information.

The language of the rule makes specific reference to the production of metadata as a subject to be discussed at the conference (see item (iii),"what metadata, if any, shall be produced"). Specific reference to metadata has also been added to the rule regarding a court order governing electronically stored information (Rule 26(f)(3)).

The parties may also want to address at the conference details regarding how the responding party accesses electronically stored information. This may aid the requesting party in formulating or refining discovery requests involving electronically stored information.

Within fourteen days after the conference, the parties must file with the court a plan that deals with electronically stored information. If the parties are not able to agree on certain issues, they shall file a statement so indicating. The parties must submit a plan to the

court whether there was a conference as of right or by agreement, or by order of the court.

Electronically stored information orders. The language of Rule 26(f)(3) provides a court with discretion to enter an order relating to electronically stored information and sets forth the matters that may be addressed in such an order. These matters are drawn in part from Rule 4 of the Uniform Rules Relating to the Discovery of Electronically Stored Information.

A court may enter an order after the parties have filed a plan, or upon motion or stipulation of the parties, or sua sponte. A court order may be entered whether or not the parties have conferred. If the parties have agreed about the method to assert or preserve a claim of privilege or protection (Rule 26(f)(3)(F)), the court order may so state.

Limitations on electronically stored information discovery. Rule 26(f)(4) is drawn from Rule 8 of the Uniform Rules Relating to the Discovery of Electronically Stored Information. It provides considerations for a judge to limit discovery of electronically stored information and to allocate the costs involved. Rule 26(f)(4) applies regardless of whether the parties have had a conference or not.

The philosophy behind Rule 26(f)(4) is similar to that of Federal Rule 26(b)(2)(B), reflecting a two-tiered approach to electronic discovery. Upon request, electronic discovery shall be produced, unless limited under Rule 26(f)(4)(E). However, a party believing that electronically stored information is "inaccessible" (as defined in Rule 26(f)(1)) may object to the discovery. In the event that there is a motion to compel the discovery, or a motion for protective order, the court will then determine whether to order the discovery. See Rule 26(f)(4)(C).

Reporter's Notes (2008): The addition of subparagraph (5) to Rule 26(b) adds to the Massachusetts discovery rules the requirement of a "privilege log."

The first sentence of subparagraph (5) is taken in part from the 1993 amendment to Rule 26(1) of the Federal Rules of Civil Procedure that sets out a procedure in connection with a claim of privilege or protection in response to a discovery request. This 1993 amendment has not been previously adopted in Massachusetts. Unlike the cognate Federal rule, the Massachusetts rule specifically uses the term "privilege log."

Language has been added to the first sentence of the Massachusetts version in order to facilitate judicial review of the appropriateness of a claim that a matter is privileged or otherwise subject to protection. The second sentence of the rule allows the party seeking discovery and the party withholding the information, by written agreement, or the court to waive the requirement of a privilege log or to limit the log to "certain documents, written communications, or things." The rule also makes clear that a party need not include information in the privilege log that is itself privileged.

As is the case with the federal rule, there is no specific requirement in the

Massachusetts rule that the privilege log he produced simultaneously with the claim of privilege or protection.

In an attempt to resolve discovery disputes without the need for court intervention, the parties are encouraged to confer and resolve areas of disagreement regarding privilege or protection, including agreeing on the timing of the production of the privilege log. See Superior Court Rule 9C ("Settlement of Discovery Disputes") and Boston Municipal Court and District Court Joint Standing Order No. 1-04 ("Civil Case Management"), III, D, 4 ("Contested Discovery").

The requirement of a privilege log applies to a claim of privilege or right to protection asserted by a party/ only. This rule imposes no obligation to provide a privilege log on the part of a nonparty who withholds privileged information after service of a subpoena for the production of documentary evidence under Rule 45(h), although a court would appear to have authority to order preparation of a log.

Reporter's Notes (1996): Rule 26(c) has been amended to add a reference to "judicial district" to take into account the applicability of the Rules to the District Court and Boston Municipal Court.

Reporter's Notes (1973): As a result of S.J.C. Rule 3:15, Massachusetts practitioners are reasonably familiar with a broadened philosophy of discovery. The discovery rules (Rules 26-37) are in many respects similar to S.J.C. Rule 3:15. This is understandable, as Rule 3:15 and the new discovery rules were patterned in large measure upon Federal Rules of Civil Procedure, 26-37. On March 30, 1970, however, the Supreme Court promulgated an amended version of the federal discovery rules, containing several significant departures from existing patterns (and hence from Rule 8:15). Rules 26-37, although patterned closely upon the revised federal discovery rules, depart from them in several significant particulars. In each instance, the Advisory Committee felt the departure to be warranted either by Massachusetts needs or by ingrained Massachusetts practice.

Rule 26 expresses the overall philosophy of the discovery rules. It lists the types of available discovery; it emphasizes that, unless the Rules otherwise provides, the methods may be used as frequently as necessary; it specifies the scope of discovery in terms not of admissibility at the trial, but rather in terms of the possibility of discovering admissible evidence; and it spells out the procedure for relief from harassment-by-discovery.

Unlike S.J.C. Rule 3:15, Rule 26 explicitly permits the discovery of the existence and contents of an insurance agreement where such insurance may be the basis for satisfaction of the judgment, either directly or by way of indemnity. The insurance application, however, is not similarly discoverable. Of course, in an action in which the insurance policy or the application therefor is an essential element of the case, as, for example, in an action for the proceeds of a life insurance policy, the contents of both the policy and the application would be discoverable; Rule 26(b)(2) does not apply.

The first paragraph of Rule 26(b)(3) regulates the discovery of materials prepared in anticipation of litigation. First, such materials are not discoverable at all, unless they meet the requirements of Rule 26(b)(1); that is, they must be relevant to the subject matter of the pending action and/or reasonably calculated to lead to the discovery of admissible evidence. Second, the party seeking discovery must show (a) that he has substantial need of the materials to prepare his case; and (b) that he would sustain severe hardship were he to be forced to obtain the equivalent of such materials by means other than discovery. It will be noted that the "good cause" requirement of former Federal Rule 34 (and S.J.C. Rule 3:15) has been eliminated, to be replaced by a specified special showing. The language, which is taken verbatim from Federal Rule 26(b)(3), as amended, is designed to "conform to the holdings of the cases" construing the former Federal Rules, 48 F.R.D. 497, 500 (1970).

Third, in keeping with the rule of Hickman v. Taylor, 329 U.S. 495 (1947), discovery, except in extremely unusual circumstances, may not be had of an attorney's mental impressions and similar intellectual work-product. This protection applies also to "other representative(s) of a party", provided their work relates to litigation. This pertains to "mental impressions and subjective evaluations of investigators and claim-agents," 48 F.R.D. 500, 502 (1970).

The second paragraph of Rule 26(b)(3) is taken verbatim from its federal counterpart. "Many, but not all, of the considerations supporting a party's right to obtain a statement applies also to the non-party witness. Insurance companies are increasingly recognizing that a witness is entitled to a copy of a statement and are modifying their regular practice accordingly," 48 F.R.D. 497, 508 (1970).

Rule 26(b)(4) contains the full text of the cognate federal rule. It permits the following means of discovering certain information pertaining to experts:

1. Through interrogatories:

a. The identity of each prospective expert witness;

b. The subject matter on which he is expected to testify; and

c. The facts, opinions (and grounds therefor) as to which the expert is expected to testify.

2. Upon obtaining a court order, discovery may continue "by other means", which presumably includes discovery of documents, and depositions. (The question of fees and expenses will be considered hereafter.) An expert retained for litigation purposes need divulge his opinion only upon a showing of circumstances which preclude the discovering party's obtaining the information by other means.

The exceptional circumstances of this rule do -not apply to the report of a non-witness examining physician, which is specially regulated by Rule 35(b).

In the usual situation, the party seeking discovery must pay the expert's fee for time spent in, for example, attending a discovery deposition and for time spent by a non-witness expert in responding to any kind of "exceptional circumstances" discovery.

Moreover, in the former case, the court may require the discovering party to pay his opponent a portion of the expense incurred in initially obtaining the fact and opinion from the expert; in the case of "exceptional circumstances" discovery of expert opinion, the court must order payment.

Rule 26(c), which substantially copies Federal Rule 26(c), provides the mechanism by which a person (whether party or not) from whom discovery is sought may obtain court relief in the event he believes he is being unfairly oppressed. Generally, the order will be sought in the court in which the action is pending. However, in the ease of a deposition being taken in another county, the order may be sought from the court in the county where the deposition is to be taken. It is assumed that the latter court will be co-equal to the former court. Thus, in an action pending in the Barnstable Superior Court, in which a deposition is being taken at Boston, the application for relief will be made to the Suffolk Superior Court.

Rule 26(d) copies Federal Rule 26(d) and makes clear that the so-called "rule of due diligence" no longer obtains. The parties, that is, may conduct discovery simultaneously; no longer will the party who first files notice of his opponent's deposition win, for that reason alone, priority in the conducting of depositions. The rule does contemplate that in certain situations, convenience and justice may require a court-imposed order of discovery. In the ordinary case, however, discovery will proceed in whatever order the parties select.

Rule 26(e) follows Federal Rule 26(e). Rule 26(e)(1) requires supplementation of previously complete responses to discovery (either in a deposition or by interrogatories, or otherwise) in only certain limited respects: (a) the identity and location of persons having any knowledge of discoverable matters, provided the identity and location of such persons was previously directly sought by discovery; and (b) the identity of each prospective expert witness and the subject on which he is expected to testify, again provided that such information was directly sought by previous discovery. Rule 26(e)(1)(B) also requires disclosure of the substance of the expert's testimony. Otherwise, a party who desires to force his opponent to supplement prior discovery may do so only (a) if he obtains an order of court; (b) if he obtains his opponent's agreement; or (c) if he strictly requests supplementation of prior answers to make this clear.

Rule 27: Depositions Before Action or Pending Appeal

(a) Before Action.

(1) Petition. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court where these rules apply may file a verified petition in the Superior Court in the county or District Court in the judicial district, as the case may be, of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an

action cognizable in a court where these rules apply but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the Commonwealth in the manner provided in Rule 4 for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent, or an incapacitated person as defined in G.L. c.190B the provisions of Rule 17(b) apply.

(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the Commonwealth, it may be used in any action involving the same subject matter subsequently brought in such a court, in accordance with the provisions of Rule 32(a).

(b) Pending Appeal. If an appeal has been taken from a judgment of a court of this Commonwealth or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in that court. In such case the party who desires to perpetuate the testimony may make a motion in that court for leave to

take the depositions, upon the same notice and service thereof as if the action was pending in that court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in pending actions.

(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Amended May 3, 1996, effective July 1, 1996; amended June 24, 2009, effective July 1, 2009.

Reporter's Notes (2009): The 2009 amendments reflect changes resulting from the adoption of the Massachusetts Uniform Probate Code.

Reporter's Notes (1996): Rule 27(a)(1) has been amended to add a reference to the District Court in the relevant judicial district to take into account the applicability of the Rules to the District Court and Boston Municipal Court.

Reporters' Notes (1973): Rule 27, substantially tracking Federal Rule 27, regulates the taking of depositions for a purpose other than discovery, i.e., for preservation of testimony before an action is commenced, or for a similar purpose after trial, but during the pendency of an appeal. Rule 27 supersedes G.L. c. 233, secs. 46-63. Rule 27 contains no provision for recording the deposition in the Registry of Deeds (or anywhere else); compare practice under G.L. c. 233, s. 50. The major substantive difference between Rule 27 and prior practice is that under Rule 27(a)(3), a deposition may not be taken unless a court determines that the perpetuation of testimony "may prevent a failure or delay of justice". Under G.L. c. 233, s. 46, no similar determination had to be made; the person desiring to perpetuate testimony merely applied in writing to a justice of the peace and a notary public (or any two justices or notaries) requesting them to take the deposition.

Rule 28: Persons Before Whom Depositions May Be Taken

(a) Within the United States. Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term officer as used in Rules 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29.

(b) In Foreign Countries. In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the laws of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

Amended Oct. 27, 1981, effective Jan. 1, 1982.

Reporters' Notes (1973): Rule 28 copies Federal Rule 28. It describes the persons before whom depositions may be taken, either within the United States or abroad. Within the United States, any person authorized to give oaths may preside at the taking of a deposition. As a practical matter, virtually every court reporter holds a commission as a notary public; accordingly, in almost every instance, the court reporter administers the oath and then takes the testimony.

Rule 29: Stipulations Regarding Discovery Procedure

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and (2) modify the procedures provided by these rules for other methods of discovery.

Effective July 1, 1974.

Reporters' Notes (1973): Rule 29 changes Federal Rule 29. The Federal Rule requires court approval for any extension of time: (a) to answer interrogatories; (b) to produce documents, etc.; or (c) to respond to a request for admission. This requirement clashes squarely with Massachusetts practice. Under G.L. c. 231 s. 72, "[p]arties may make

agreements relative to amendments and the time of filing papers, which shall be equivalent to an order of the court to the same effect." Because existing practice seems to have worked so well, and because the requirement of prior court approval seems so likely to produce unnecessary anguish to bench and bar, Rule 29 follows Massachusetts procedure. It should be noted that even Arizona, which has otherwise adopted a firm policy of tracking the Federal Rules without change (see Frank, "Arizona and the Federal Rules," 41 F.R.D. 79, 86-87 (1966)), has rejected the court-approval requirement of Federal Rule 29.

Rule 30: Depositions Upon Oral Examination

(a) When Depositions May Be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if: (i) the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e)(except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule); (ii) there is no reasonable likelihood that recovery will exceed $5,000 if the plaintiff prevails; (iii) the action is pending in the Superior Court and there has been a trial in a District Court before a transfer; (iv) there has been a hearing before a master; or (v) the relief sought is the custody of minor children, divorce, affirmance or annulment of marriage, separate support, or any like relief. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of Examination: General Requirements; Special Notice; Non- Stenographic Recording; Production of Documents and Things; Deposition of Organization.

(1) A party desiring to take the deposition of any person upon oral examination shall give at least seven days' notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the county where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage abroad, and will be unavailable for examination unless his

deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification. If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) By leave of court upon motion with notice and an opportunity to be heard in opposition, or by stipulation in writing of all parties, a party taking an oral deposition may have the testimony recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under subdivision (c), any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by non-stenographic means. In any event, however, where testimony is to be recorded by audio-visual means, the provisions of Rule 30A shall apply.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request and, notwithstanding the provisions of subdivision (b)(1) of this Rule, the party making the request shall give at least 30 days' notice in writing to every other party to the action. The court may on motion with or without notice allow a shorter or longer time.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) By leave of court upon motion with notice and an opportunity to be heard in opposition, or by stipulation in writing of all parties, a deposition may be taken by telephone. For the purpose

of this rule and Rules 28(a), 37(a)(1), 37(b)(1) and 45(d), a deposition taken by telephone is taken in the county and at the place where the deponent is to answer questions propounded to him.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 43(b). The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or by voice writing or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and such party shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition; but the examination shall proceed. Any objection to testimony during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. Testimony to which objection is made shall be taken subject to the objections. Counsel for a witness or a party may not instruct a deponent not to answer except where necessary to assert or preserve a privilege or protection against disclosure, to enforce a limitation on evidence directed by the court or stipulated in writing by the parties, or to terminate the deposition and present a motion to the court pursuant to Rules 30(d) or 37(d).

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county or judicial district, as the case may be, where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes

in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Delivery by Officer; Exhibits; Copies; Notice of Receipt.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the court generally or in a specific case or stipulated by the parties, he shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly deliver or send it to the party taking the deposition.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the material desires to retain them he may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its receipt to all other parties.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another

party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Amended Dec. 16, 1980, effective Jan. 1, 1981; Oct. 27, 1981, effective Jan. 1, 1982; May 25, 1982, effective July 1, 1982; Jan. 30, 1989, effective March 1, 1989; May 3, 1996, effective July 1, 1996; Oct. 1, 1998, effective Nov. 2, 1998.

Reporter's Notes to Rule 30(c) (2001): In 1998, the Supreme Judicial Court amended Rule 30 in an attempt to deal with "deposition abuse." Rule 30(c) now provides that objections during a deposition "shall be stated concisely and in a non-argumentative and non-suggestive manner." Further, the amended rule prohibits an instruction to a deponent not to answer except where a privilege may exist or where some other legal protection against disclosure may apply. The language of the Massachusetts rule was drawn from Federal Rule 30.

Despite the 1998 amendment which requires that objections be made in a non-argumentative and non-suggestive manner, suggestive objections or comments continue to be made at depositions. Further commentary is therefore in order. The intent of the 1998 amendment was to prevent the indirect coaching of witnesses by objections or comments from counsel. Thus, the attorney who, after a question, interjects the suggestive objection or comment "if you remember," "if you understand," or "if you have personal knowledge," acts contrary to the language and spirit of the new rule by indirectly suggesting how the witness should respond. The questioning attorney may consider taking appropriate action in response to such coaching suggestions, including suspending the deposition for purposes of obtaining an appropriate court order (Rule 30(d)).

It has been suggested that some attorneys, cognizant of the prohibition against suggestive comments or hints during the deposition, may accomplish the same result by seeking to confer with the client in private prior to the client answering the question. It appears that the rule does not permit such conferences except where appropriate to preserve a privilege or protection against disclosure. A deponent, for example, may not realize that the privilege against self-incrimination provides a legal basis to decline to answer a question; intervention of counsel and a conference with counsel may be necessary to determine whether the deponent will invoke the privilege. In other circumstances, however, the use of private conferences between lawyer and deponent would serve to provide an end-ran around the 1998 rule against suggestive objections and the general rule that examination of witnesses at depositions "may proceed as permitted at the trial..." (Rule 30(c)). Just as a lawyer may not interrupt the questioning of a witness in order to confer in private and develop strategy with the witness, nor should the lawyer be allowed to interrupt the flow of questions at a deposition. Nor may the deponent stop

the deposition in order to seek the advice of counsel (except in the ewe of a privilege or protection against disclosure).

Reporter's Notes to Amendments to Rule 30(c) (1998): The purpose of the 1998 amendments to Rule 30, modeled after 1993 amendments to Federal Rule 30, is to address the problem created by objections during a deposition and by directions to a deponent by counsel not to answer a question.

Under the revise rule, objections must "be stated concisely and in a non-argumentative and non-suggestive manner." The Notes of the Advisory Committee on the 1993 federal change aptly described the problem concerning objections as follows: "Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond."

A related problem concerns instructions by counsel to a deponent not to answer. This issue is addressed by the 1998 amendments by adding language to Rule 30(c), taken in part from 1993 amendments to Federal Rule 30, that such instructions are permissible only in the case of a privilege (such as attorney-client privilege) or protection against disclosure (such as the "work product" protection set forth in Mass. R. Civ. P. 26(b)(3)); where a court has imposed limitations on the deposition testimony; where the parties have entered into a written stipulation setting forth limitations; or to terminate the deposition in order to move in court for an appropriate order regarding the deposition (for example, a motion under Mass. R. Civ. P. 30(d) to terminate or limit the deposition on the basis that "the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party").

It should be noted that Mass. R. Civ. P. 30(c) makes clear that if there is objection to certain aspects of the deposition, the deposition shall proceed and the objection preserved. Objecting counsel does have the option, of course, under Mass. R. Civ. P. 30(d), to suspend the deposition for purposes of seeking a court order to terminate or limit the deposition. Counsel considering such a move, however, may want to consider the technique of recommending that the objectionable questions be set aside until later in the deposition in order to allow the rest of the deposition to move forward without interruption. After the rest of the questioning is complete, counsel may then consider whether it is necessary to bring the objections to the attention of the court.

The 1998 amendments have also moved the last sentence of the second paragraph of Rule 30(c) to the first paragraph for clarity purposes, thus leaving the focus of the second paragraph on objections and evidence at depositions.

Finally, minor changes have been made to the first paragraph of Rule 30(c) in order to make the language gender-neutral.

Reporter's Notes (1996): Rule 30(d) has been amended to add a reference to "judicial district" to take into account the applicability of the Rules to the District Court and

Boston Municipal Court. Certain provisions from Mass.R.Civ.P. 30 which did not appear in the District Court version of Rule 30 (regarding leave of court where the action is pending in the Superior Court after District Court trial and where the action relates to domestic relations matters) now apply in the merged set of Rules.

Reporter's Notes (1989): Because of the simultaneous amendment to Mass.R.Civ.P. 5(d) which states that transcripts of depositions shall no longer ordinarily be presented or accepted for filing, the obligation of the officer at the deposition to file the deposition has been changed. "Unless otherwise ordered," the officer must now "deliver or send" the deposition "to the party taking the deposition" (Rule 30(f)(1)), and the party taking the deposition "shall give prompt notice of its receipt to all other parties" (Rule 30(f)(3)). See, also, Reporter's Notes to the Amendment to Rule 5(d).

Reporter's Notes (1973): Although patterned on Federal Rule 30, Rule 30 has been altered to encompass existing practice under S.J.C. Rule 3:15. The situations in which leave of court must first be obtained closely follow the strictures of S.J.C. Rule 3:15. The rest of the procedural scheme is thoroughly familiar. In order to fill what appeared to be a hiatus in Federal Rule 30, the Advisory Committee inserted in Rule 30(b)(5) language to ensure that a party seeking documentary discovery at an oral deposition provide his opponent with at least 30 days' notice.

Rule 30A: Audiovisual Depositions & Audiovisual Evidence

(a) Authorization of Audio-Visual Depositions. By leave of court upon motion with notice and an opportunity to be heard in opposition, or by stipulation of all parties, a party taking an oral deposition may have the testimony recorded by audio-visual means by complying with the provisions of this rule. Except as otherwise provided by this rule, the rules governing the practice and procedure in depositions and discovery shall apply. At the taking of any such deposition, unless the parties otherwise stipulate, or the court for good cause otherwise orders, there shall also be prepared a simultaneous stenographic record of the deposition.

(b) Notice. Except by leave of court, granted after notice and opportunity to be heard in opposition, a notice for the taking of an audio-visual deposition shall not be served sooner than six (6) months after the action has been commenced.

Every notice for the taking of an audio-visual deposition and the subpoena for attendance at that deposition shall state that it is to be recorded by audio-visual means and the name and address of the person whose deposition is to be taken. If the operator is an employee of the attorney taking the deposition, the notice shall so indicate.

(c) Procedure. The party taking the audio-visual deposition shall be responsible for assuring that the necessary equipment for making an audio-visual recording of the deposition is present at the time the deposition is taken.

The following procedure shall be observed in recording an audio-visual deposition:

(1) Opening of Deposition. The deposition shall begin with an oral or written statement on camera which includes:

(i) the operator's name and business address;

(ii) the name and address of the operator's employer;

(iii) the date, time and place of the deposition;

(iv) the caption of the case;

(v) the name of the witness-deponent;

(vi) the name of the party on whose behalf the deposition is being taken; and

(vii) any stipulation by the parties.

The opening statement, if oral, shall be made by the officer before whom the deposition is to be taken, unless counsel agree that one of counsel will make the statement.

(2) Counsel. Counsel shall identify themselves on camera by stating their names, their addresses, and the names of the parties or persons for whom they appear at the deposition, and nothing more.

(3) Oath. The officer before whom the deposition is taken shall then identify himself and swear or affirm the witness on camera.

(4) Multiple Units. When the length of the deposition requires the use of more than one recording unit, the end of each recording unit and the beginning of each succeeding recording unit shall be announced on camera by the operator.

(5) Closing of Deposition. At the conclusion of the deposition, a statement shall be made on camera that the deposition is concluded. A statement may be made on camera setting forth any stipulation made by counsel concerning the custody of the audio-visual recording and exhibits and other pertinent matters.

(6) Index. The deposition shall be timed by a digital clock on camera which shall show continually each hour, minute and second of each recording unit of the deposition, or otherwise suitably indexed by a time generator. The date(s) on which the deposition is taken shall be shown.

(7) Objections. An objection shall be made as in the case of depositions taken solely by stenographic means.

(8) Interruption of Recording. No party shall be entitled to cause the operator to interrupt or halt the recording of the audio-visual deposition without the assent of all other parties present.

(9) Submission to Witness; Changes; Signing. Unless the parties have stipulated that a simultaneous stenographic record of the deposition not be prepared, the provisions of Rule 30(e) shall apply to the stenographic record of the deposition. Except upon order of the court

and upon such terms as may be provided, the witness shall have no right to examine and view the audio-visual recording.

(10) Certification. The officer before whom the audio-visual deposition is taken shall attach to the original audio-visual recording a certificate stating that the witness was sworn or affirmed by him and that the audio-visual recording is a true record of the testimony given by the witness.

(d) Recording Officer; Use of Camera; Copies. The officer before whom an audio-visual deposition is taken shall be subject to the provisions enumerated in Rule 28(a)-(c).

During the taking of the audio-visual deposition, the officer shall assure that the audio-visual tape records the witness in a standard fashion at all times during the deposition, unless all counsel agree otherwise, or unless on motion before the court, the court directs otherwise. In no event shall the officer use, or permit the use of, audio-visual tape camera techniques to vary the view which is being recorded for presentation in the courtroom unless agreed upon or ordered by the court as recited above. As an exception to the foregoing, the officer shall, at the request of the attorney questioning the witness, cause a close-up view of a deposition exhibit or visual aid to be taken while the witness is being questioned concerning the exhibit.

Upon the request of any of the parties, the officer shall provide, at the cost of the party making the request, a copy of the deposition in the form of a videotape or other form of audio-visual recording, an audio recording, or a written transcription.

(e) Custody; Filing; Notice of Filing. Unless the parties have otherwise stipulated, the officer shall take custody of each recording unit upon its completion and shall retain custody of all completed units throughout the deposition. When a deposition is to be completed on another day, the officer shall also take custody of any uncompleted recording unit during the interval. Upon completion of a deposition, unless the parties have otherwise stipulated, the original audio-visual recording and the typewritten transcript of the deposition shall be filed forthwith by the officer with the clerk of the trial court in accordance with subdivision (1) of Rule 30(f) and notice of its filing shall be given as provided in subdivision (3) of that rule.

(f) Inspection and Release of Audio-Visual Recordings. Except upon order of the court and upon such terms as may be provided, the audio-visual recordings on file with the clerk of the court in which the action is pending shall not be available for inspection or viewing after their filing and prior to their use at the trial of the case or their disposition in accordance with this rule. The clerk may release the audio-visual recording to the officer taking the deposition, without an order of court, for the purpose of preparing a copy at the request of a party as provided in subdivisions (a) and (d) of this rule.

(g) Rulings on Objections; Editing of Recording. If any party has any objections to the audio-visual deposition which would otherwise be made at trial, pursuant to Rule 32(b), such objections

shall if practicable, be submitted to the trial judge prior to commencement of the trial or hearing for the purpose of obtaining rulings on such objections. An audio copy of the sound track or the transcript may be submitted in lieu of the audio-visual recording for this purpose. For the purpose of ruling on the objections, the trial judge may view the entire audio-visual recording, or view only those parts of the audio-visual recording pertinent to the objections made, or he may listen to an audio-tape recording submitted in lieu of the audio-visual recording, or he may read the transcript. The trial judge shall, if practicable, rule on the objections prior to the commencement of the trial or hearing and shall return the recording to the party who took the audio-visual deposition, with notice to all parties of his rulings and of his instructions as to editing. The editing shall reflect the rulings of the trial judge and shall then remove all references to the objections. After making a copy of the audio-visual recording, the officer shall cause said copy to be edited in accordance with the court's instructions. He shall then cause both the original audio-visual recording and the edited version thereof, each clearly identified, to be returned to the trial judge for use during the trial or hearing. The original audio-visual recording shall be preserved intact and unaltered.

(h) Transcribing of Audio Portion; Marking for Identification. At a trial or hearing, that part of the audio portion of an audio-visual deposition which is offered in evidence and admitted, or which is excluded on objection, shall be transcribed in the same manner as the testimony of other witnesses. Both the original unedited audio-visual recording and the edited version shall be marked for identification.

(i) Use of Audio-Visual Deposition and Responsibility for Assuring Necessary Equipment at Time of Use. An audio-visual deposition may be used for any purpose and under any circumstances in which a stenographic deposition may be used.

The party desiring to use the audio-visual deposition for any purpose shall be responsible for assuring that the necessary equipment for playing the audio-visual recording back is available when the audio-visual deposition is to be used. When an audio-visual deposition is used during a hearing, a trial, or any other court proceeding, the party first using such audio-visual deposition in whole or in part shall assure the availability of the same or comparable videotape playback equipment to any other party for such other party's use in further showing such audio-visual deposition during the hearing, the trial, or other court proceeding or at any rehearing, recess, or continuation thereof.

(j) Discrepancy Between Audio-Visual Deposition and Stenographic Deposition. Upon the claim of a party that a discrepancy exists between the audio-visual deposition and the stenographic deposition, the trial judge shall determine: (i) whether such discrepancy reasonably appears; and (ii) whether the relevant part of the audio-visual deposition is intelligible. If the relevant part of the audio-visual deposition is not intelligible, the stenographic deposition controls. If the relevant part of the audio-visual deposition is intelligible and the trial judge rules that a discrepancy reasonably appears, the jury, in a jury action, shall determine from the audio-visual

deposition the deponent's testimony. The trial judge, in his discretion, may permit the jury to be aided in its determination by the stenographic deposition.

(k) Evidence by Audio-Visual Recording.

(1) Authorization of Audio-Visual Testimony or Other Evidence. Upon motion with notice and an opportunity to be heard, or by stipulation of all parties approved by the court, or upon the court's motion, the court may order, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, that all or part of the testimony, and such other evidence as may be appropriate, may be presented at trial by audio-visual means. The provisions of Rule 30A shall govern such audio-visual recordings.

(2) Introduction as Evidence. Notwithstanding Rule 30A(i) or Rule 32(a)(3), but subject to rulings on objections pursuant to Rule 30A(k)(3), any party may introduce any such audio-visual recording, that has been authorized under Rule 30A(k)(1), at trial if the court finds its introduction to be in the interest of justice.

(3) Objections. Before such audio-visual recording is admitted at trial, the trial judge shall rule upon any objection to any portion thereof and the recording shall be edited to reflect the rulings. The objections shall be presented to the trial judge and the editing to reflect the rulings shall be accomplished, each in accordance with the provisions of Rule 30A(g).

(4) Part of the Record; Not an Exhibit. Any portion of the audio-visual recording so introduced shall be part of the record, and subject to the provisions of Rule 30A(h), but not an exhibit.

(l) Costs. The reasonable expense of recording, editing, and using an audio-visual deposition may be taxed as costs, pursuant to the provisions of Rule 54(e).

(m) Audio-Visual Depositions of Treating Physicians and Expert Witnesses for Use at Trial.

(1) Authorization and Definitions. Unless the court upon motion orders otherwise, any party intending to call a treating physician or expert witness at trial as that party's own witness may take the oral deposition of any such treating physician or expert witness by audio-visual means for the purpose of its being used as evidence at trial in lieu of oral testimony. Such depositions shall be known as "audio-visual expert witness depositions for trial." This rule 30A(m) does not apply to another party's treating physician or expert, discovery from whom is subject to the provisions of Rule 26(b)(4)(A) or 26(b)(4)(B). A "treating physician" is a physician who has provided medical treatment to a party or other person involved in the lawsuit, and who will be questioned about such treatment and matters related thereto. An "expert witness" is a person qualified as an expert by knowledge, skill, experience, training, or education to testify in the form of an opinion or otherwise.

(2) Timing, Curriculum Vitae, and Report. Except by leave of court, a notice for the taking of an audio-visual expert witness deposition for trial shall not be served (i) sooner than six (6) months after the action has been commenced, and (ii) until thirty (30) days after a written report of that witness has been furnished to all parties. Such report shall contain a curriculum

vitae of that witness, shall cover the subjects described in Rule 26(b)(4)(A)(i), and, in the case of a treating physician, a description of the treatment and its costs. Any party may move for further discovery of that witness, to take place prior to the audio-visual expert witness deposition for trial, in accordance with Rule 26(b)(4)(A)(ii).

(3) Notice; Opposition. In addition to the requirements of rule 30A(b), every notice for the taking of an audio-visual expert witness deposition for trial shall state that it is to be recorded by audio-visual means with the purpose of its being used as evidence at trial in lieu of oral testimony. Any motion in opposition to the taking of an audio-visual expert witness deposition for trial must be filed within fourteen (14) days of receipt of the notice or on or before the specified time for taking of the audio-visual expert witness deposition for trial, if such time is less than fourteen (14) days from receipt of the notice. The audio-visual expert witness deposition shall not occur until the court rules on the motion opposing the deposition.

(4) Ruling on Objections; Editing of Recording. When an audio-visual expert witness deposition for trial is taken, all evidential objections shall, to the extent practicable, be made during the course of the deposition. If any party has made objections during the course of the audio-visual expert witness deposition for trial, or has any objections to such deposition which would otherwise be made at trial, pursuant to Rule 32(b), such objections shall be filed with the trial judge or a motion judge, if the trial judge has not yet been designated, no later than twenty-one (21) days before the commencement of the trial. Objections not so submitted shall be deemed waived, except to the extent that events at the trial, which could not have reasonably been foreseen by the objecting party, necessitate an objection at trial. The nonobjecting party shall file a response to the submissions by the objecting party within fourteen (14) days of the receipt of the objecting party's submissions. Failure to respond to an objection shall constitute a waiver with respect thereto. The party making the objection shall be responsible for providing the judge with a stenographic record of the deposition, unless it is already on file at the court, and, if the judge requests, with the audio-visual recording or an audio copy of the sound track. For the purpose of ruling on the objections, the judge may utilize the entire stenographic record, audio-visual recording, or audio-tape recording, or those portions that are pertinent to the objections made. The judge shall rule on the objections prior to the commencement of trial or hearing and give notice to all parties of the rulings and instructions as to editing. The editing shall reflect the rulings of the judge and shall remove all references to the objections. The officer shall cause a copy of the audio-visual recording to be edited in accordance with the court's instructions. The officer shall then cause copies of the edited version thereof to be delivered to the parties who ordered them, and to the court, if so instructed by the court. The stenographic record, and the original audio-visual recording and the edited version thereof, if any, shall be preserved intact and unaltered.

(5) Use at Trial. Unless the court upon motion orders otherwise, an audio-visual expert witness deposition for trial may be used by any party for any purpose and under any circumstances in which a stenographic deposition may be used and, in addition, may be used at trial in lieu of oral testimony whether or not such witness is available to testify.

(6) Applicability of Rule 30A(a)-(l). Except as altered by Rule 30(A)(m), the provisions of rule 30A(a)-(l) shall apply to audio-visual expert witness depositions for trial.

Adopted Dec. 16, 1980, effective Jan. 1, 1981. Amended July 20, 1984, effective Jan. 1, 1985; Oct. 23, 1989, effective Jan. 1, 1990.

Reporter's Notes (1996): With the merger of the District Court civil rules into the Mass.R.Civ.P., Rule 30A of the Mass.R.Civ.P. governing audio-visual depositions is made applicable to District Court proceedings.

Reporter's Notes (1989): These amendments accompany the simultaneous amendment adding Mass.R.Civ.P. 30A(m), which creates a new category of videotape depositions called "audio-visual expert depositions for trial." See Reporter's Notes to Proposed Amendment Adding Mass.R.Civ.P. 30A(m). That amendment will make audio-visual depositions a more frequent occurrence. In considering the addition of Rule 30A(m), it made sense to make some clarifications for all audio-visual depositions. The provisions of Rule 30A(a)-(l) apply to audio-visual expert depositions for trial except when altered by Rule 30A(m). Mass.R.Civ.P. 30A(m)(6).

The amendment to Mass.R.Civ.P. 30A(c) gives the party taking any audio-visual deposition the responsibility for assuring that the necessary equipment is available at the time the deposition is taken. The amendment to Mass.R.Civ.P. 30A(i) requires the party first using an audio-visual deposition in whole or in part to be responsible for providing the necessary play-back equipment for the use of all parties at such hearing, trial, or any other court proceeding or "at any rehearing, recess, or continuation thereof."

The amendment to Mass.R.Civ.P. 30A(d) adds to the recording officer's duties the obligation to assure "that the audio-visual tape records the witness in a standard fashion at all times during the deposition, unless all counsel agree otherwise, or unless on motion before the court, the court directs otherwise." The purpose is to make the audio-visual deposition as close as possible to what the fact-finder would see and hear if the witness were present in the courtroom.

Mass.R.Civ.P. 30A(c), (d), and (i) are otherwise left intact, except for appropriate changes to the titles in Rules 30(d) and (i) which reflect the additions.

The amendments borrow in part from a similar rule in South Carolina (S.C.Cir.Ct.Prac.R. 99C.(4) and 99K.).

Rule 30A deals generally with "Audio-visual Depositions and Audio-visual Evidence." This amendment adds a new set of provisions dealing specifically with "Audio-Visual Depositions of Treating Physicians and Expert Witnesses for Use at Trial."

Delays in court have been a substantial problem in the Commonwealth. Many lawyers and judges believe that a major reason for the seeking and granting of continuances in the past has been the unavailability of expert witnesses and treating physicians on the day set for trial. Unlike Rule 30A(k)(1), which requires prior court approval for the use of audio-visual testimony at the trial, the amendment authorizes such use with respect to a party's own treating physicians and expert witnesses or neutral treating physicians and expert witnesses whom that party intends to call at trial as that party's own witness, regardless of whether the witness is available to testify in person, unless the court orders otherwise. Rule 30A(m)(5). The goals are to eliminate a major reason for continuances; to facilitate intelligent settlement, since the lawyers will know in advance that the testimony of such expert or treating physician will be available for the trial; and to aid physicians and other experts in more predictably scheduling and efficiently utilizing their time.

The amendment does not apply to "another party's treating physician or expert, discovery from whom is subject to the provisions of Rule 26(b)(4)(A) or 26(b)(4)(B)." Rule 30(m)(1).

The amendment covers both treating physicians and experts, because there may be occasions when a treating physician's testimony relates only to observable facts and not expert opinion. The amendment's inclusion of the treating physician, whether or not the physician's testimony is technically that of an expert, should both help to eliminate disputes over the boundary between fact and opinion and to meet the other goals of the amendment, such as eliminating a major reason for continuances.

Because such audio-visual testimony is in lieu of live testimony, the amendment contains a number of protections for the opposing party, e.g., notice in advance that the audiovisual deposition is for the "purpose of its being used as evidence at trial in lieu of oral testimony" (Rule 30A(m)(3)); the requirement that a curriculum vitae and a report covering "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion," and, in the case of a treating physician, providing a description of the treatment and its costs, be furnished to all parties at least thirty days before such audiovisual deposition (Rule 30A(m)(2)); the ability to move for a discovery deposition prior to the audio-visual expert witness deposition (Rule 30A(m)(2)); the ability to move to oppose the deposition before it is taken, with the deposition stayed until the court rules on the motion (Rule 30A(m)(3)); and detailed provisions for the ruling on objections and the editing of the audio-visual recording (Rule 30A(m)(4)).

Rule 30A(m)(5) permits a party either to use live testimony of the treating physician or expert, or the audio-visual expert witness deposition for trial, but not both. However, if a

party chooses to use the live testimony of the witness, the opponent may still cross-examine and use portions of the audio-visual expert witness deposition for trial for appropriate purposes.

Except where this amendment changes the audio-visual deposition rules for this specific type of deposition for use at trial, the remaining provisions of Rule 30A apply. Rule 30A(m)(6). Consequently, all of Rule 30A applies to audiovisual expert witness depositions for trial, except the first sentence of Rule 30A(a) (requiring prior leave of court or stipulation of all parties to authorize the deposition), the provisions of Rule 30A(g) (Rulings on Objections, Editing of Recording), and Rule 30A(k)(1)(2)(3) (Evidence by AudioVisual Recording). Rule 30A(k)(4), making any portion of an audio-visual recording introduced at the trial part of the record, but not an exhibit, is applicable to audio-visual expert witness depositions for trial. Although Rule 30A(b) (Notice) is applicable to Rule 30A(m) depositions, Rule 30A(m)(2) adds an additional requirement related to the timing of such deposition (requirement of written report) and Rule 30A(m)(3) requires additional information in the notice for the taking of such deposition.

There may be occasions when a party becomes aware of the need for an audio-visual deposition of a treating physician or expert witness at a time too close to trial to permit compliance with all of the provisions of Rule 30A(m). The discretionary motions under Rule 30A(a) and 30A(k)(1), and the court's authorization under Rule 30A(k)(2), remain available to meet such emergency situations.

The amendment borrows in part from a similar rule in New Jersey (N.J.Civ.Prac.R. 4:14-9) and from a paragraph of the South Carolina videotaped deposition rule (S.C.Cir.Ct. Prac.R. 99 I.). The definition of "expert witness" (30A(m)(1)) is derived from a portion of Fed.R.Evid. 702 and Proposed Mass.R.Evid. 702.

Reporter's Notes (1984): This amendment permits a court to authorize in advance of trial, or at the trial, the use of an audio-visual recording as testimony or other evidence "in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court." The major purpose of this rule is to permit judges to prevent the delay of trials which often occurs in order to accommodate the schedule of witnesses, particularly experts. Rule 30A(k)(3) makes the obtaining of rulings on objections and the editing of the audio-visual recordings subject to the provisions of 30A(g). Rule 30A(k)(4) provides that any portion of the audio-visual recording that is introduced "shall be part of the record, but not an exhibit." This is so testimony by audio-visual recording is not accorded more weight than live testimony. Rule 30A(k)(4) makes any portion of the audio-visual recording that is introduced subject to the transcription and marking provisions of Rule 30A(h).

Even without a Rule 30A(k)(1) order, one may still be able to use an audio-visual deposition at trial pursuant to the provisions of Rule 32(a). (See Rule 30A(i).)

Rule 31: Depositions of Witnesses Upon Written Questions

(a) Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and deliver or send the deposition to the party taking the deposition, attaching thereto the copy of the notice and questions received by him.

(c) Notice of Receipt. When the deposition is received the party taking it shall promptly give notice thereof to all other parties.

Amended Jan. 30, 1989, effective March 1, 1989.

Reporter's Notes (1989): This amendment is necessitated by the amendment to Mass.R.Civ.P. 5(d). Since depositions will no longer be filed in court, except as otherwise ordered by the court, this amendment requires the officer who takes responses at depositions upon written questions to "deliver or send the deposition to the party taking the deposition." Rule 31(b). The party who took the deposition is required promptly to notify all other parties of receipt of the deposition from the officer. Rule 31(c). See, also, Reporter's Notes to the Amendment to Rule 5(d).

Reporter's Notes (1973): Rule 31, a copy of Federal Rule 31, governs the little-used practice of conducting a deposition on written interrogatories, a process which has been aptly described as washing one's hands without removing one's gloves.

Rule 32: Use of Depositions in Court Proceedings

a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is out of the Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and when an action has been brought in any court of the United States or of any state and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(b) Objections to Admissibility. Subject to the provisions of Rules 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition

or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Effect of Taking or Using Depositions. A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subdivision (a)(2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Amended Oct. 27, 1981, effective Jan. 1, 1982; April 25, 1984, effective July 1, 1984.

Reporters' Notes (1984): Before this amendment, Mass.R.Civ.P. 32(a)(3)(B) permitted a deposition to be "used by any party for any purpose if the court finds: ... (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition . . ." This prior language was taken from the Fed. R.Civ.P. The amendment changes the text to "out of the Commonwealth" because the "out of the United States" language is inappropriate for a state system. Moreover, the state boundaries, which also delimit the subpoena power, provide a more logical and easier test to apply than "100 miles."

Reporters' Notes (1973): Rule 32 tracks Federal Rule 32, as amended, and substantially embodies S.J.C. Rule 3:15, which was in turn based upon the unamended Federal Rule 32. It sets out the procedure for use of depositions in court. In general, and subject to substantive evidentiary objections, a deposition can be used without limit for purposes of impeaching the deponent if he testifies in court; the deposition of a party can be used without limit (including the proof of the adverse party's case) by an adverse party; the deposition of a justifiably absent witness may be used for any purpose. Rule 32(a)(4) protects against unfair piecemeal use of a deposition. The rest of Rule 32 sets out in detail the preservation of objections.

Rule 33: Interrogatories to Parties

(a) Availability: Procedures for Use.

(1) In General. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

(2) Number. No party shall serve upon any other party as of right more than thirty interrogatories, including interrogatories subsidiary or incidental to, or dependent upon, other interrogatories, and however the same may be grouped or combined; but the interrogatories may be served in two or more sets, as long as the total number of interrogatories served does not exceed thirty. The court on motion for good cause shown may allow service of additional interrogatories; or the party interrogated, subject to Rule 29, may agree to such service. All interrogatories shall be numbered consecutively.

(3) Answers; Final Request for Answers. Each interrogatory shall be answered separately and fully in writing under the penalties of perjury, unless it is objected to, in which event the reasons for objection shall be stated in lieu of the answer; each answer or objection shall be

preceded by the interrogatory to which it responds. The answers are to be signed by the person making them, the objections by the person or attorney making them. The party upon whom the interrogatories have been served shall serve answers and objections, if any, within 45 days after the service of the interrogatories. The court may, on motion with or without notice, specify a shorter or longer time. Unless otherwise specified, further answers to interrogatories shall be served within 30 days of the entry of the order to answer further. The interrogating party may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory. Alternatively, for failure to serve timely answers or objections to interrogatories (or further answers, as the case may be), the interrogating party may serve a final request for answers, specifying the failure. The final request for answers shall state that the interrogating party may apply for final judgment for relief or dismissal pursuant to paragraph 4 in the event that answers or objections are not timely received. The party upon whom the interrogatories have been served shall serve the answers or objections either within 30 days from the date of service of the final request or prior to the filing of an application for a final judgment for relief or dismissal, whichever is later.

(4) Application for Final Judgment; Affidavit. In the event that answers or objections have not been received and after the expiration of 40 days from the date of service of the final request for answers, or such further time as the parties may agree upon in writing or the court may allow, the interrogating party may file a written application for entry of final judgment for relief or dismissal. The period of time set forth in the previous sentence shall be deemed to include the three day period allowed pursuant to Rule 6(d). The application must be accompanied by a copy of the final request for answers and an affidavit containing the following information:

a. the date and manner in which interrogatories were served on the party against whom relief is sought;

b. the fact that the 45-day time period for service of answers or objections has expired, and no answers have been received;

c. the date and manner in which the final request for answers was served;

d. the fact that the 40-day time period for answers or objections after a final request for answers has expired, and that no answers or objections have been received; and

e. that the party now applies for final judgment for relief or dismissal.

(5) Motion to Extend. The pendency of a motion to extend any time hereunder, unless the motion be assented to, or heard within 30 days of filing, shall not stay the entry of any judgment.

(6) Entry of Judgment. Upon receipt of the application for final judgment and only if accompanied by a copy of the final request for answers and by the required affidavit as set forth above, the clerk shall enter an appropriate judgment, subject to the provisions of Rules 54(b), 54(c), 55(b)(1), 55(b)(2) (final sentence), 55(b)(4) and 55(c).

(b) Scope: Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed, or until a pretrial conference, or other later time.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Amended June 27, 1974, effective July 1, 1974; September 16, 1975, effective January 1, 1976; October 27, 1981, effective January 1, 1982. Amended March 5, 2002, effective May 1, 2002. Amended June 24, 2009, effective August 1, 2009.

Reporter's Notes (2009): Amendments to Rule 55(b) effective March 1, 2008 eliminated differing default provisions for the Superior Court and the District Court and resulted in changes to the numbering of some of the subparagraphs of Rule 55(b). The March 2008 amendments were part of a group of amendments to the Massachusetts Rules of Civil Procedure in light of the adoption of the statewide one-trial system for civil cases. The 2009 amendment to Rule 33(a)(6) corrects an oversight in the March 2008 amendments by correcting the cross-references to Rule 55(b) that are found in Rule 33(a)(6).

Reporter's Notes to Amendment to Rule 33(a) (2002): In 2002, Rule 5(d) was amended to provide that interrogatories under Rule 33 and answers and objections to interrogatories no longer were to be filed in court, unless otherwise ordered by the court. The non-filing requirement of amended Rule 5(d) necessitated changes in the Rule 33 procedure by which a party who has served interrogatories seeks to have judgment entered against another party for failure to respond to the interrogatories.

Prior to the 2002 amendment, Rule 33(a) provided that a party upon whom interrogatories had been served must serve answers (and any objections) within 45 days of service and must file the original answers in court. If answers were not served within the 45-day period, the interrogating party had the option of filing with the court an application requesting final judgment for relief or dismissal. The filing of the application

then triggered a 30-day period for filing of the answers. If answers were not filed within the 30-day period, the interrogating party could then file a reapplication for final judgment for relief or dismissal. After a reapplication had been filed and upon determination by the clerk that the answers had not been filed, the clerk would then enter a final judgment.

The 2002 amendment adopts a procedure, taken in part from Superior Court Administrative Directive No. 91-1, for obtaining judgment for failure to answer interrogatories that takes into account that the clerk of court will now be unable to determine whether the interrogatories have been answered (because answers are no longer to be filed with the court). The 2002 amendment also added subdivisions and headings to Rule 33(a).

Rule 33(a)(1), entitled "In General." There has been no change to the first paragraph of former Rule 33(a), other than the addition of the number (1) and the title.

Rule 33(a)(2), entitled "Number." Likewise, there has been no change to the second paragraph of former Rule 33(a), other than the addition of the number (2) and the title.

The third and fourth paragraphs of Rule 33(a) are rewritten as follows.

Rule 33(a)(3), entitled "Answers, Final Request for Answers. "The revised rule provides that if answers or objections are not served within 45 days, the interrogating party may serve (but not file) a final request for answers. (The former language requiring a written application for final judgment has been changed to take into account that under the revised procedure, there is no filing made in the clerk's office at this point.) The final request must also contain a notice that the interrogating party intends to apply for final judgment, thereby putting the latter on notice of the serious consequences of a failure to answer the interrogatories. The act of serving the request on the interrogated party will trigger an additional 30-day period for the interrogated party to answer or, object.

Rule 33(a)(4), entitled "Application for Final Judgment; Affidavit" Rule 33(a)(4) provides that if answers or objections to the interrogatories still have not been received and 40 days have expired from the date of service of the final request for answers, the interrogating party may file a written application (under the former procedure, referred to as a reapplication) for final judgment for relief or dismissal. A copy of the application must also be served on each party to the case (see Rule 5(a)). In calculating the 40-day period set forth in Rule 33(a)(4), the additional three days that otherwise would be granted under Rule 6(d) after service by mail are not to be included. The application must be accompanied by a copy of the final request that had been earlier served on the interrogated party and an affidavit containing specified information setting forth the chronology leading up to the application. As long as a copy of the final request for answers and the requisite affidavit have been filed, the clerk shall then enter judgment for relief or dismissal (see Rule 33(a)(6)).

The 2002 amendments also eliminated the provision that an agreement to extend the time for answering be filed in court. Given the non-filing requirements for interrogatories and answers, this provision is now unnecessary.

Rule 33(a)(5), entitled "Motion to Extend" There has been no change to the text of this paragraph (formerly, the last paragraph of Rule 33(a)), other than the addition of the number (5) and the title.

Rule 33(a) (6), entitled "Entry of Judgment " Rule 33(a)(6) is drawn from the final sentence of the former fourth paragraph of Rule 33(a), with some housekeeping changes designed to correct an omission made in 1996 when the District Court rules were merged into the Massachusetts Rules of Civil Procedure. In connection with the merger in 1996, certain paragraph numbers in Rule 55(b) were changed, but corresponding changes were not made to the references to Rule 55(b) that were contained in Rule 33(a).

* Probably should read "in the clerk's office".

Reporters' Notes (1975): In order to simplify the policing of interrogatory practice, Rule 33(a) has been amended to establish a more rational procedure. The basic period for answering original interrogatories will now be 45 days after service, although the court may order a longer or shorter time. If the court has ordered further answers to interrogatories, they must be filed within 30 days of the entry of the order, unless the court specifies otherwise. (The original Rule 33(a) provided no deadline for filing further answers to interrogatories after court order.) If at the expiration of allowed time the original answers or further answers have not been filed, the interrogating party may at his option, move for an order under Rule 37. In most cases, however the party will take advantage of the simplified procedure established by Rule 33(a). He will file a written application with the clerk asking (if he is plaintiff) for the relief sought in the complaint, or (if he is defendant) for dismissal of the action. The clerk, upon receipt, notifies all parties; within 30 days from the date of the notice, the interrogating party may again apply in writing, and the appropriate final judgment will be entered. The judgment will be treated as a default judgment; if the plaintiff is the prevailing party, judgment will be entered in the amount prayed for, provided it can be ascertained by inspection of the complaint or by a ready computation. In other cases, the court will hold a hearing to establish the amount of damages.

Rule 33(a) thus gives a party, in the case of original interrogatories, 75 days, and in the case of further answers, 60 days, to file answers before the guillotine can fall. And even then, the dilatory party may file a motion to extend his time to answer. So long as that motion is heard within 30 days of filing, it too can stave off the judgment. On the other hand, the mere filing of a motion to extend time does not, as in the past, of itself stay the entry of any judgment. However, even after a judgment has been entered, Rule 33(a), by specific reference to Rule 55(c), allows a party to seek to have the judgment vacated, provided he can fit through one of the limited openings afforded by Rule 60(b).

In originally answering interrogatories, the responding party has 45 days, and in which to serve a copy of the answers and objections; because service is complete upon mailing, Mass.R.Civ.P.5(b), this means that he need only place the answers in the mail before the deadline. In furnishing further answers to interrogatories, however, he is obligated not merely to serve them within 30 days after the entry of the order for further answers, but actually to file them in the clerk's office by that time. This means that he must ensure that the further answers are in the clerk's hands on or before the deadline date. This same requirement applies to the 30-day grace period after the original 45-day (or in the case of further answers to interrogatories 30-day) period has expired. To avoid the entry of the appropriate final judgment, the delinquent party must cause his answers to be filed * the clerk's office; mere mailing by that time does not suffice. Indeed, in each of these situations, even early mailing may not be enough if, through any inadvertence (including an error by the postal service), see Pierce v. Board of Appeals of Carver, 3 Mass.App.Ct. 352, 329 N.E.2d 774, 777 (1975), the paper is not at the clerk's office, indeed actually filed there, Hackney v. Butler, 339 Mass. 605, 609, 162 N.E.2d 68, 71 (1959).

The revision changes Rule 33(a) in three other minor ways:

(1) As before, a party must answer each interrogatory or precisely state his reasons for objecting to it. Now, however, when preparing the response, the responding party must place each respective interrogatory on the paper, so that it immediately precedes the answer or objection' to which it responds.

(2) The revision makes explicit that after serving a copy of

the answers (or objections) on the interrogating party within the appropriate period, the responding party must file the original (i.e. ribbon copy) with the court.

(3) Unlike original Rule 33(a), the revision establishes a definite initial period (30 days) for furnishing court-ordered further answers. In all other respects, the obligation to supply further answers must conform to the same procedural requirements which govern original answers.

Reporters' Notes (1973): Rule 33 governs interrogatory practice. It changes Massachusetts practice slightly.

Interrogatories may be served, as of right, by the defendant at any time after commencement of the action (i.e., after filing of the complaint; see Rule 3); by the plaintiff simultaneously with, or after, service of summons and complaint upon the defendant to whom the interrogatories are addressed.

The Massachusetts thirty-interrogatory limit, G.L. c. 231, s. 61, has been adopted, with one important modification: the permitted thirty interrogatories may be divided into "sets", provided that the total number of interrogatories served may never exceed thirty. This modification changes the rule that a "party shall not interrogate an adverse party more than once unless the court otherwise orders." G.L. c. 231, s. 68.

The following examples illustrate what is permitted and what is forbidden:

Case # 1:Three sets, each with 10 interrogatories. Permissible.

Case # 2:Four sets, three of six interrogatories, one of 12. Permissible.

Case # 3:Two sets, one of 16 interrogatories, one of 15. Impermissible without court order. In the absence of such order, the clerk will, upon the application of the party being interrogated, strike the second set; the interrogating party may then prepare, serve, and file a set of 14 interrogatories or less (i.e., so that his total is reduced to thirty or less),

Rule 33 also liberalizes the Massachusetts practice concerning failure to answer interrogatories. Super.Ct. Rule 36; see also Super.Ct, Rule 27. Under Rule 33, a party has thirty days as of right to answer interrogatories. Upon his failure to answer, the interrogating party may file a verified application, which in turn causes the clerk to notify all parties that unless answers are filed within an additional 30 days, a dismissal or judgment shall be entered. If the answers are not on file by the end of thirty days, the dismissal or judgment shall be entered, subject to vacation as of course by the clerk if answers are filed within 20 additional days. (The parties, by agreement, or the court, on motion with notice, may enlarge or shorten any of these times, or may vacate the dismissal or judgment.)

It should be observed that under Rule 33 the guillotine for refusal to answer interrogatories does not fall until:

30 days originally to answer,

Plus 30 days after first notice,

plus 20 days after notice of conditional dismissal or judgment

total 80 days.

Further, entry of judgment is governed by Rule 55, which requires a hearing on the issue of damages, of which hearing the defendant is entitled to an additional 7 days' notice.

Dismissal, which is the equivalent under these rules of the old nonsuit, does not entail the same consequences as judgment (the equivalent of the old default), hence no additional hearing need be held.

One final aspect of Rule 33 is notable. Under Rule 33(c) a party whose answer depends on an examination of business records may, in lieu of answering, offer the interrogating party the right to inspect the records and derive his own answer. This privilege is conditioned upon an equality of bother. Only if the bother of deriving the information would be substantially the same for both parties may the party interrogated shift the burden to his opponent; otherwise, he may not. This procedure is taken verbatim from amended Federal Rule 33(c).

Rule 34: Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land, for Inspection and Other Purposes

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b) :

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information - including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations - stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) Contents of the Request. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts, and it may specify the form in which electronically stored information is to be produced.

(2) Responses and Objections.

(A) In General. The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(B) Responding to a request for production of electronically stored information. The response may state an objection to a requested form for producing electronically stored

information. If the responding party objects to a requested form - or if no form was specified in the request - the party shall state the form or forms it intends to use.

(C) Producing the documents or electronically stored information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party shall produce documents as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request;

(ii) The producing party may produce copies of the documents, including by electronic means, provided that, if requested, the producing party affords all parties a fair opportunity to verify the copies by comparison with the originals.

(iii) If a request does not specify a form for producing electronically stored information, a party shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iv) A party need not produce the same electronically stored information in more than one form.

(c) Persons Not Parties.

(1) This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

(2) As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

Amended Oct. 27, 1981, effective Jan. 1, 1982; September 24, 2013, effective January 1, 2014; June 29, 2016, effective August 1, 2016.

Reporter's Notes

Reporters' Notes (2016) Rule 34 was amended in 2016 to recognize the common practice of producing copies of documents rather than permitting inspection of the originals (Rule 34(b)(2)(C)(ii)). This amendment reflects a similar amendment to the Federal Rules of Civil Procedure effective in 2015.

The 2016 amendment further states that upon request, the producing party shall provide "all parties a fair opportunity to verify the copies by comparison with the originals." This language, which is not part of the Federal Rules, reinforces the requesting party's right to inspect the original documents under the existing language of Rule 34(a). To the extent that producing the original is deemed unduly burdensome or expensive, the producing party may seek a protective order under Rule 26(c). Such an order may restrict access to the original document, or may allow access upon payment of costs associated with

production of the original. Rule 34(c) was also amended to add a cross-reference to Rule 45 (Rule 34(c)(2)). Rule 45 had been amended in 2015 to allow a "documents only" subpoena against a nonparty (Rule 45(d)).

Reporters' Notes (2014): The 2014 amendments to Rule 34 were part of a series of amendments concerning discovery of electronically stored information. For background, see the 2014 Reporter's Notes to Rule 26.

The title to Rule 34 has been changed to add a reference to "electronically stored information." The title to Rule 34 is now consistent with the title to Rule 34 of the Federal Rules of Civil Procedure.

The 2014 amendments made some stylistic changes in Rule 34(a) so as to conform the rule to the format set forth in Rule 34(a) of the Federal Rules of Civil Procedure. In addition, the phrase "or electronically stored information" has been added to Rule 34(a)(1)(A), also in conformity with the cognate federal rule.

Formatting and stylistic changes have been made in Rule 34(b), again modeled after Rule 34(b) of the Federal Rules of Civil Procedure, but no substantive changes were intended. Language has been added to Rule 34(b)(1) to the effect that a request for production "may specify the form in which electronically stored information is to be produced."

Rule 34(b)(2)(B) and (C), modeled after Federal Rule 34(b)(2)(D) and (E), have been added to deal with responding to a request for production of electronically stored information and the important aspect of the form for producing such information.

Issues surrounding the production of electronically stored information, including the format for production, should be discussed by the parties in their conference regarding electronically stored information, if there is one. See Rule 26(f)(2).

Reporters' Notes (1973): Rule 34 copies Federal Rule 34, which in turn changed earlier Federal Rule 34 and S,J.C. Rule 3:15. Previously, a party seeking discovery of documents or objects was required to move for a court order compelling such discovery. Under Rule 34, the party seeking discovery need merely serve a request upon his opponent. Only if the opponent objects to the request must the discovering party obtain a court order.

Rule 35: Physical and Mental Examination of Persons

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal

control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Examining Physician.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition; but he does not otherwise waive his right to object at the trial to the introduction into evidence of the report or any part thereof.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

Effective July 1, 1974.

Reporters' Notes (1973): Rule 35 tracks Federal Rule 35 (as amended). The general procedural framework remains identical to that under S.J.C. 3:15. No one need submit to a physical examination except upon a court order granted only "for good cause shown". If the person examined obtains from the discovering party a copy of the report of the examination (which he is entitled to do, as of right), the discovering party is entitled to any reports of any other examination (prior or subsequent) pertaining to the same condition which the person examined may have.

Rule 36: Requests for Admission

(a) Request for Admission. A party may serve upon any other party a written request for admission, for purposes of the pending action, only, of the truth of any matters within the scope

of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission either (1) a written statement signed by the party under the penalties of perjury specifically (i) denying the matter or (ii) setting forth in detail why the answering party cannot truthfully admit or deny the matter; or (2) a written objection addressed to the matter, signed by the party or his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it. Each admission, denial, objection, or statement shall be preceded by the request to which it responds.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will

prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

Effective July 1, 1974.

Reporters' Notes (1973): Rule 36, tracking amended Federal Rule 36, governs Requests for Admission, a procedure long familiar to Massachusetts practitioners as "Notices to Admit", G.L. c. 231, s. 69. Although the matters subject to such request under Rule 36 are somewhat broader than those under the statute, Rule 36 should cause no difficulty; the expanded response period (30 days, as opposed to 10 under G.L. c. 231, s. 69) should in fact permit more flexible use of this discovery device.

Rule 37: Failure to Make Discovery: Sanctions

(a) Motion for Order Compelling Discovery. Upon reasonable notice to other parties and all persons affected thereby, a party may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or on matters relating to a deposition, to the court in the county or judicial district, as the case may be, where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county or judicial district, as the case may be, where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer or a designation or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that

the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) Sanctions by Court in County or District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county or judicial district, as the case may be, in which the deposition is being taken the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6)or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court may require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure.

(c) Expenses on Failure to Admit.

If a party fails to admit the genuineness of any documents or the truth of any matters as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable grounds to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.

If a party or an officer, director, or a managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party willfully fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court may require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Expenses Against Commonwealth. Except to the extent permitted by statute, expenses and fees may not be awarded against the Commonwealth under this rule.

(f) **Failure to Provide Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions on a party for failing to produce electronically · stored information lost as a result of the routine, good-faith operation of an electronic information system.

Amended June 27, 1974, effective July 1, 1974; December 2, 1983, effective January 1, 1984; amended effective May 1, 1994; July 1, 1996; amended September 24, 2013, effective January 1, 2014.

Reporter's Notes (2014): The 2014 amendments to Rule 37 were part of a series of amendments concerning discovery of electronically stored information. For background, see the 2014 Reporter's Notes to Rule 26.

These amendments added section (f) to Rule 37. This section establishes a "safe harbor" provision that will preclude imposition of sanctions where electronically stored information "is lost as a result of the routine, good-faith operation of an electronic information system." It is taken from Rule 37(e) of the Federal Rules of Civil Procedure and Rule 5 of the Uniform Rules Relating to the Discovery of Electronically Stored Information.

The 2014 amendment to Rule 37, as well as the other amendments to the discovery rules regarding electronically stored information, was not intended to change any existing law in Massachusetts on the obligation to preserve evidence when litigation is reasonably anticipated or has commenced. A duty to preserve may exist as a matter of common law, statutory law, or by reason of a court order.

The following comment from the 2006 Advisory Committee Notes to Federal Rule 37 is equally applicable in Massachusetts:

The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold."

Reporter's Notes (1996): The 1996 amendments to paragraphs (a)(1) and (b)(1) merely add appropriate references to "Judicial district" to take into account the applicability of the Rules to the District Court and Boston Municipal Court as result of the merger.

Reporter's Notes to Amendment to Mass.R.Civ.P. 37(a)(4) (1994): Prior to this amendment, there was an anomaly in Mass. R.Civ.P. 37(a)(4). The first paragraph, relating to motions for orders to compel discovery which are granted, says "the court may, after opportunity for hearing, require" the payment of reasonable expenses, including attorney's fees, "incurred in obtaining the order." The second paragraph, concerning such motions that are denied, used the verb "shall" instead of "may". Although the companion Federal Rule uses "shall" in both paragraphs, the Standing Advisory Committee believes that "may" makes more sense. First, as was pointed out in Smith and Zobel, Massachusetts Practice, Rules Practice, Vol. 7 (1975), at See. 37.8, "[e]ach paragraph contains explicit language allowing the court not to order the payment if it finds either that the opposition or pressing of the motion, as the case may be, were substantially justified, or that 'other circumstances make an award of expenses unjust.'" Therefore both paragraphs should "be taken in the permissive rather than the mandatory

sense." Second, hearings are time-consuming, and it does not make sense to require hearings in all cases when the net result win usually be either the imposition of no sanction or a modest sanction. After the amendment, whether the motion to compel discovery has been won or lost, the judge may (but does not have to) order the payment of reasonable expenses, but such an order for payment cannot be made without first providing the opportunity for a hearing.

Reporter's Notes (1983): This amendment permits the court to apply sanctions against those who fail to comply with a discovery order, without the necessity of finding that the noncompliance was wilful. The amendment makes the rule consistent with Fed.R.Civ.P. 37(b), upon which it was patterned. The amendment's purpose is to increase compliance with discovery orders, by making it easier for parties to achieve, and judges to award, sanctions for the failure to comply with a discovery order.

Reporter's Notes (1973): Rule 37 substantially follows Federal Rule 37. The sanctions imposed are those listed in S.J.C. Rule 3:15, with the addition of penalties for willful disobedience of a physical examination order under Rule 35. Rule 37, like Rule 3:15, but unlike Federal Rule 37, makes clear that an order of contempt may issue only if the refusal to obey a discovery order is willful; similarly, only a willful failure to produce another person for a physical examination justifies the imposition of any sanctions at all.

Rule 38: Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by Part 1, Article 15 of the Constitution of this Commonwealth or as given by a statute shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such a demand may be endorsed upon a pleading of the demanding party. In an action transferred, retransferred, removed or appealed from a District Court or the Municipal Court of the City of Boston, a demand for a trial by jury by a party entitled of right thereto shall be made in accordance with the statute governing such transfer, retransfer, removal, or appeal; but if the statute makes no provision for such demand, he shall be deemed to have waived such right unless within 10 days after the entry of the action in the Superior Court he files such demand therein.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Amended June 27, 1974, effective July 1, 1974; May 3, 1996, effective July 1, 1996; November 28, 2007, effective March 1, 2008.

Reporter's Notes (2008): Rule 38(e), entitled "District Court," has been deleted, now that jury trials are available in the District Court under the statewide one trial system, applicable to civil actions commenced on or after August 31, 2004 (St. 2004, c. 252). Thus, the provisions of Rule 38 governing the right to jury trial, demand, specification, and waiver, are applicable in the District Court.

Reporter's Notes (1996): The 1996 amendment to Rule 38 adds a new section (e), making the rule inapplicable to District Court proceedings. This is consistent with the approach taken by the now repealed District/Municipal Courts Rules of Civil Procedure. However, Rule 38 will apply in the District Court in those limited circumstances where trial by jury in civil cases is provided by statute. See, for example, G.L. c. 218, s.s. 19A and 19B (civil jury trials in Worcester and Haverhill).

Reporter's Notes (1973): Rule 38 is substantially the same as Federal Rule 38. Rule 38(a) substitutes Part 1, Article 15 of the Massachusetts Constitution for the "Seventh Amendment to the [United States] Constitution" and deletes the words "of the United States" after the word "statute".

Rule 38(b) includes language taken substantially from Super.Ct.Rule 44 covering cases transferred, removed or appealed from a District Court.

While Rule 2 merges law and equity into one form of action, Rule 38(b), by using the language "of any issue triable of right by jury," retains the principle that in an action seeking purely equitable relief, neither party has a constitutional right to a jury trial. See Parker v. Simpson, 180 Mass. 334, 346, 62 N.E. 401, 405 406 (1902). Thus, for purposes of determining such a right, differences between legal and equitable remedies are preserved. U.S. v. Malakie, 188 F.Supp. 592, 593 (E.D.N.Y.1960).

The merger of law and equity under Rule 2 together with Rule 38(b) does alter prior Massachusetts practice in one respect. Formerly once a plaintiff commenced a proceeding in equity he was held to have waived any right which he might have to a jury trial despite the fact that his action involved primarily legal issues. See McAdams v. Milk, 332 Mass. 364, 367, 125 N.E.2d 122, 123 124 (1955) [plaintiff, in a bill to reach and apply, is not entitled, as a matter of right, to the framing of jury issues]. Gulesian v. Newton Trust Co., 302 Mass. 369, 371, 19 N.E.2d 312, 314 (1939) held that when a plaintiff "voluntarily went into equity he submitted himself to all the incidents of equity practice, including the hearing without jury of a counterclaim, even one based upon a purely legal cause of action." With the merger of law and equity, the distinction adumbrated in these decisions

will no longer be viable. The United States Supreme Court has held that if a demand for a jury trial has been made in accordance with Federal Rule 38(b), and both legal and equitable issues are presented in a single case, any legal issues must be submitted to a jury (if one is demanded) before related equitable issues are decided by the judge. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962).

The demand requirement of Rule 38(b) is not substantially different from prior Massachusetts practice. The relevant Portion of former G.L. c. 231, s. 60 allows a jury trial if ".. . a Party before issue joined, or within ten days after the time allowed for filing the answer or plea, or within ten days after answer or plea has by consent of the plaintiff or permission of the court been filed, or within such time after the parties are at issue as the court by general or special order directs, files a notice that he desires a jury trial...." (Emphasis supplied).

The italicized language made clear that the court might in its discretion extend the period for demanding a jury trial.

See Gechijian v. Richmond Ins. Co., 305 Mass. 132, 143, 25 N.E.2d 191, 198 (1940). While no such language appears in Rule 38(b), the same result may be reached under Rule 39(b), which grants the court discretion, in cases where a jury could have been demanded under Rule 38, upon motion to order a jury trial of any or all issues.

No previous rule or statute in Massachusetts allowed a party in the Superior Court to specify issues which he wished jury tried. cf. G.L. e. 185, s. 15. Rule 38(c) does permit such limited jury demand. This in no way prejudices the opposing party, because he is entitled, within 10 days after service of the demand or such lesser time as the court may order, to serve a counter demand for jury trial of any or all the remaining issues of fact in the action.

The first sentence of Rule 38(d) reaches the same result as prior Massachusetts practice. See Alpert v. Mercury Publishing Co., 272 Mass. 39, 42, 172 N.E. 221, 222-223 (1930).

The second sentence of Rule 38(d) alters prior practice. Under Rule 38(d) a demand for a trial by jury may not be withdrawn without the consent of the parties. Under former G.L. c. 231, s. 60A, any party to the proceeding could waive a jury trial which had been claimed. This presented a possible trap. Suppose P demanded a jury trial within the time permitted by G.L. c. 231, s. 60. Relying on P's demand, D did not make a similar demand. Subsequently, after the period set out in s. 60, if P waived his jury trial claim, D could subsequently be granted a jury trial only at the court's discretion, not as a matter of right. See Gouzoulas v. F.W. Stock & Sons, 223 Mass. 537, 538, 112 N.E. 221, 222 (1916). The approach of Rule 38(d) eliminates this pitfall.

Rule 39: Trial by Jury or by the Court

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. In the District Court, the action shall be designated upon the docket as a jury action in accordance with the statutory provisions governing trials by jury in the District Court. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury as to some or all of the issues or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the constitution or statutes of this commonwealth.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues.

(c) Framing Jury Issues. In all actions not triable of right by a jury, the court, except where otherwise provided by law, may upon motion frame issues of fact to be tried by a jury.

Amended May 3, 1996, effective July 1, 1996; November 28, 2007, effective March 1, 2008.

Reporter's Notes (2008): A new second sentence has been added to Rule 39(a) to deal with statutory requirements in the District Court regarding designating an action on the docket as a jury action. The statewide one-trial statute provides in G.L. c. 218, s.19B(a) as follows: In any case in which a party has filed a timely demand for a jury trial, the action shall not be designated upon the docket as a jury action until after the completion of a pretrial conference, a hearing on the results of the conference and until the disposition of any pretrial discovery motion and compliance with any order of the court pursuant to the motions. Rule 39(d), entitled "District Court," has been deleted, since jury trials are available under the statewide one-trial system in District Court civil actions. Thus, Rule 39, as amended by the addition of the above sentence to Rule 39(a), will be applicable in the District Court.

Reporter's Notes (1996): The 1996 amendment to Rule 39 adds a new section (d), making the rule inapplicable to District Court proceedings.

This is consistent with the approach taken by the now repealed District/Municipal Courts Rules of Civil Procedure. However, Rule 39 will apply in the District Court in those limited circumstances where trial by jury in civil cases is provided by statute. See, for example, G.L. c. 218, s.s. 19A and 19B (civil jury trials in Worcester and Haverhill).

Reporter's Notes (2008): A new second sentence has been added to Rule 39(a) to deal with statutory requirements in the District Court regarding designating an action on the

docket as a jury action. The statewide one trial statute provides in G.L. c. 218, s. 19B(a) as follows:

In any case in which a party has filed a timely demand for a jury trial, the action shall not be designated upon the docket as a jury action until after the completion of a pretrial conference, a hearing on the results of the conference and until the disposition of any pretrial discovery motion and compliance with any order of the court pursuant to the motions.

Rule 39(d), entitled "District Court," has been deleted, since jury trials are available under the statewide one trial system in District Court civil actions. Thus, Rule 39, as amended by the addition of the above sentence to Rule 39(a), will be applicable in the District Court.

Reporter's Notes (1973): Rule 39 is substantially the same as Federal Rule 39.

Rule 39(a) in essence states that even though a demand for a jury trial has been made, the parties or their attorneys may subsequently, by stipulation, consent to trial without a jury. While Rule 39(a) does not literally so indicate, such stipulation may be made with respect to fewer than all of the issues. Further, the trial judge may determine that a right to trial by jury of some or all of the issues does not exist under the constitution or statutes of the Commonwealth.

Rule 39(b) authorizes the trial judge, in his discretion, upon motion, to order a jury trial on any or all of the issues despite the fact that a timely demand for a jury trial was not made under Rule 38(b). Some courts have taken the position that before relieving a party from waiver of a jury trial under Rule 38(d) the court should require a showing of highly exceptional circumstances, and that mere inadvertence of counsel in failing to make a timely demand for a jury trial does not justify the judge's exercise of discretion. Lemelson v. Gerber Products Co., 39 F.R.D. 336, 337 (E.D.N.Y.1966); see also Transocean Air Lines v. Pan American World Airways, Inc., 36 F.R.D. 43, 45 (S.D.N.Y.1964). Other courts have held the trial judge's discretion to order a jury trial largely unlimited. Britt v. Knight Publishing Co., 42 F.R.D. 593, 595 (D.S.C.1967). This latter position more closely resembles prior Massachusetts practice and is the proper interpretation of Rule 39(b). See former G.L. c. 231, s. 60; Gechijian v. Richmond Ins. Co., 305 Mass. 132, 25 N.E.2d 191 (1940).

Rule 39(c) differs substantially from Federal Rule 39(c), which authorizes the court, in all actions not triable of right by a jury, upon motion or of its own initiative to try any issue with an advisory jury. Findings of such a jury are only advisory in nature unless both parties have consented that the verdict be binding.

Rule 39(c) does not adopt the advisory jury, but retains the prior practice of framing issues of fact to be tried by a jury. See former G.L. c. 214, s.s. 34, 36. Because Rule 39(c) by definition refers only to actions "not triable of right by a jury," it will apply principally in actions where the plaintiff seeks only equitable relief. Therefore the reference to framing issues of fact should be taken to incorporate prior "equity" practice with respect

to such issues. Under prior law, the framing of issues of fact was not a matter of right. See Marcoux v. Charroux, 329 Mass. 687, 688, 110 N.E.2d 362, 363 (1953). If, however, issues were framed for a jury the jury was not merely advisory. Whether the original proceeding was in equity, Westfield Savings Bank v. Leahey, 291 Mass. 473, 475, 197 N.E. 160, 161 (1935), or in probate, Lambert v. Cheney, 221 Mass. 378, 380, 108 N.E. 1078, 1079 (1915), the jury's verdict bound both parties, subject to the court's common law supervisory powers, Crocker v. Crocker, 188 Mass. 16, 20, 73 N.E. 1068, 1070 (1905).

Rule 40: Assignment of Cases for Trial: Continuances

(a) Assignment of Cases for Trial. Cases may be assigned to the appropriate calendar or list for trial or other disposition by order of the court including general rules and orders adopted for the purpose of assignment. Precedence shall be given to actions entitled thereto by statute.

(b) Continuances. Continuances shall be granted only for good cause, in accordance with general rules and orders which the court may from time to time adopt.

(c) Affidavit or Certificate in Support of Motion. The court need not entertain any motion for a continuance based on the absence of a material witness unless such motion be supported by an affidavit which shall state the name of the witness and, if known, his address, the facts to which he is expected to testify and the basis for such expectation, the efforts which have been made to procure his attendance or deposition, and the expectation which the party has of procuring his testimony or deposition at a future time. Such motion may, in the discretion of the court, be denied if the adverse party will admit that the absent witness would, if present, testify as stated in the affidavit. The same rule shall apply, with the necessary changes in points of detail, when the motion is grounded on the want of any material document, thing, or other evidence.

Effective July 1, 1974.

Reporter's Notes (1973): Rule 40 governs in a general way the final progress of cases toward trial. Federal Rule 40, on the other hand, deals only with the assignment of cases for trial. It says nothing of continuances.

It should be emphasized that Rule 40 states general principles pertaining to assignment and continuances. It does not attempt to lay down detailed regulations. Thus the matters covered by Super.Ct.R. 57, 57a, and 59-70 will still require the promulgation of standing court orders, and Rule 40(a) anticipates this.

Rule 40(a) does not alter practice. In Massachusetts, courts have the inherent power to place cases on the trial list even without request of the parties, Sweeny v. Home Owners' Loan Corporation, 307 Mass. 165, 166, 29 N.E.2d 712 (1940).

Rule 40(a) makes no explicit provision for advancing an action for speedy trial. G.L. c. 231, s. 59A allows the Court upon motion for cause shown to advance an action for speedy trial. The final sentence of Rule 40(a) embodies this practice. See also, G.L. c. 231, s.s. 59B-E, for other examples of statutory special preferences. (Even without statute, the Court seems to have power to advance cases for speedy trial. See Merchants' National Bank of Bangor v. Glendon Company, 120 Mass. 97, 99 (1876).)

Rule 40(b) and Rule 40(c) state general principles pertaining to continuances. By and large, they codify existing practice. The granting or denial of a continuance is discretionary with the court; the court's exercise of discretion will not be disturbed on appeal, absent a showing of abuse. Mowat v. Deluca, 330 Mass. 711, 712, 116 N.E.2d 322, 323 (1953). The Court may grant a discretionary continuance at any time prior to trial, indeed at any time prior to judgment. American Woodworking Machinery Co. v. Forbush, 193 Mass. 455, 457, 79 N.E. 770, 771 (1907).

Rule 41: Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; By Stipulation. Subject to the provisions of these rules and of any statute of this Commonwealth, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of this or any other state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision (a). an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof

(1) On Court's Own Motion. The court may on notice as hereinafter provided at any time, in its discretion, dismiss for lack of prosecution any action which has remained upon the docket for three years preceding said notice without activity shown other than placing upon the trial list,

marking for trial, being set down for trial, the filing or withdrawal of an appearance, or the filing of any paper pertaining to discovery. The notice shall state that the action will be dismissed on a day certain, (not less than one year from the date of the notice) unless before that day the case has been tried, heard on the merits, otherwise disposed of, or unless the court on motion with or without notice shall otherwise order. The notice shall be mailed to the plaintiff's attorney of record, or, if there be none, to the plaintiff if his address be known. Otherwise such notice shall be published as directed by the court. Dismissal under this paragraph shall be without prejudice.

(2) On Motion of the Defendant. On motion of the defendant, with notice, the court may, in its discretion, dismiss any action for failure of the plaintiff to prosecute or to comply with these rules or any order of court. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff the court shall make findings as provided in Rule 52(a).

(3) Effect. (Effective August 1, 2009). Unless the dismissal is pursuant to paragraph (1) of this subdivision (b), or unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, or for improper amount of damages in the Superior Court as set forth in G.L. c.212, § 3 or in the District Court as set forth in G. L. c. 218, § 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading or a motion for summary judgment is served, whichever first occurs, or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Effective July 1, 1974. Amended June 24, 2009, effective August 1, 2009.

Reporter's Notes (2009): An amendment to Rule 12(b), effective March 1, 2008 added a new numbered defense, 12(b)(10), dismissal for improper amount of damages in the

Superior Court as set forth in G.L. c. 212, s. 3 or in the District Court as set forth in G.L. c. 218, s. 19.

The 2009 amendment to Rule 41(b)(3) makes clear that such a dismissal does not operate as an adjudication upon the merits unless the court orders otherwise.

Reporter's Notes (1996): Prior to the merger of the District Court Rules into the Mass.R.Civ.P., the District Court version of Rule 41(b)(1) provided for dismissal for lack of prosecution after two years. As result of the merger, the three year provision of the Mass.R.Civ.P. now applies in the District Court.

Reporter's Notes (1973): Rule 41(a) provides for voluntary dismissal. Under Rule 41(a)(1), the plaintiff may dismiss without order of court merely by filing a notice of dismissal prior to an answer or a motion for summary judgment. Thereafter dismissal by the plaintiff, without court order, requires the filing of a stipulation signed by all parties. Unless otherwise provided in the notice or stipulation, such dismissal is without prejudice. If, however, the plaintiff has previously dismissed the same claim in any state or federal court, a notice of dismissal operates as an adjudication on the merits. The two dismissal rule applies automatically only to a notice of dismissal. It does not so apply if the second dismissal is (a) by stipulation (Cornell v. Chase Brass & Copper Co., 49 F.Supp. 979, 981 (S.D.N.Y.1943)); or (b) by order of court under Rule 41(a)(2).

Rule 41(a) alters prior Massachusetts practice, which allowed a plaintiff to dismiss (discontinue) an action at law as of right at any time before trial. Marsch v. Southern New England R. Corp., 235 Mass. 304, 307, 126 N.E. 519, 520 (1920); Alpert v. Mercury Publishing Co., 272 Mass. 39, 40 41, 172 N.E. 221, 222 (1930); Burnham v. MacWhinnie, 350 Mass. 17, 18 19, 213 N.E.2d 385, 386 (1965). Leave to dismiss a suit in equity without prejudice had to be obtained from the court once the defendant's situation materially changed. Keown v. Keown, 231 Mass. 404, 406 407, 121 N.E. 153, 154 155 (1918); Nicolai v. Nicolai, 283 Mass. 241, 246, 186 N.E. 240, 241 242 (1933).

The two dismissal rule will effect only a slight change in Massachusetts practice. While a discontinuance would not operate as res judicata unless a judgment had been rendered on the merits, Pontiff v. Alexander, 320 Mass. 514, 516, 70 N.E.2d 5, 6 (1946), the statute of limitations eventually terminated the right of action. Cf. Farnum v. Brady, 269 Mass. 53, 54, 168 N.E. 165 (1929).

Rule 41(a)(2) requires that an order of court precede any dismissal not covered by Rule 41(a)(1). Dismissals under Rule 41(a)(2) are without prejudice unless otherwise stated. If the defendant has counterclaimed prior to service of the motion to dismiss, the action may not be dismissed over defendant's objection unless the counterclaim can remain pending for independent adjudication. This latter point changes prior practice. Verdone v. Verdone, 345 Mass. 773, 774, 187 N.E.2d 853, 854 (1963).

Rule 41(b)(1) does not appear in Federal Rule 41(b). It has been adopted to follow salutory Massachusetts practice.

Rule 41(b)(2) provides for involuntary dismissal upon motion of the defendant on one of two grounds: (1) failure to comply with the rules or any order of the court; or (2) in an action tried without a jury, if, upon the facts and the law, the plaintiff has shown no right to relief.

No pre rule procedure existed in Massachusetts for dismissal of a jury waived or equity case, after the plaintiff has rested, on the ground that upon the facts and the law the plaintiff had shown no right to relief. Under Rule 41(b)(2) this procedure applies to all non jury cases, whether the relief sought is legal or equitable.

Rule 41(b)(3) provides that involuntary dismissal under Rule 41(b)(2) operates as an adjudication on the merits unless the court otherwise orders.

Rule 41(c) makes the provisions of Rule 41 applicable to counterclaims, cross claims and third party claims.

Rule 41(d), pertaining to allowing first action costs as precondition for a second action, does not alter existing Massachusetts law. G.L. c. 261, s. 10.

Boyajian v. Hart, 312 Mass. 264, 267, 44 N.E.2d 964, 966 (1942), held that even apart from statute:

"... whenever the prevention of vexatious litigation and the interests of justice require, a court has power, both in actions at law and in suits in equity, to stay a new proceeding for substantially the same cause as a former one until costs for which the plaintiff has become liable in the former proceeding have been paid ... and ... the court has the power in appropriate cases to dismiss the second proceeding altogether."

Rule 42: Consolidation: Separate Trials

(a) Courts Other Than District Court: Consolidation. When actions involving a common question of law or fact are pending before the court, in the same county or different counties, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Courts Other Than District Court: Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial in the county where the action is pending or in a different county of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the constitution of this Commonwealth or as set forth in a statute.

(c) District Court: Joinder for Trial; Consolidation. When actions involving a common question of law or fact are pending before a single District Court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may

make such orders concerning proceedings therein as may tend to avoid unnecessary cost or delay.

A party who moves for the consolidation and trial together of cross actions between the same parties or two or more actions, including other court proceedings, arising out of or connected with the same accident, event or transaction, pending in more than one District Court, shall file the original copy of the motion in any such court. The party making such motion shall send notices thereof forthwith, together with a copy of the motion, to interested parties and to the clerk(s) of the other court(s) involved in the requested consolidation. The party making such motion shall annex thereto a certificate stating the time and place of filing such motion, the names and addresses of all interested parties, and showing that the party has given such notices and the time and manner of giving the same. The said motion and certificate shall then be forwarded forthwith by the clerk to the presiding justice of the Appellate Division District of the said court and it shall be marked for hearing and all parties so notified. The clerk shall note upon the motion and docket the day and hour of the filing of same. All notices received by a clerk of the filing of a motion for consolidation in another court shall be docketed by the clerk in the proper case.

Upon allowance of any such motion, the presiding justice or some justice designated by the presiding justice shall make an order providing for the consolidated trial of the actions involved, and copies of such order shall be forwarded to the clerks of the courts involved in the requested consolidation. The clerk of the court in which the consolidated actions will be heard shall notify all interested parties of the order to consolidate. All papers filed in the case, all bonds, and a certified copy of the docket entries shall be forwarded by the clerk(s) of the court(s) of origin to the court where such actions or proceedings are consolidated, and such actions or proceedings shall thereafter proceed in the court to which they are thus transferred as though originally entered there.

If all the parties to any such actions agree upon consolidation and trial together, the order therefor shall be signed by the presiding justice or some justice designated by the presiding justice.

Whenever in this rule any reference is made to the presiding justice, in the Municipal Court of the City of Boston it shall be deemed to refer to the Chief Justice of that court.

(d) District Court: Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the constitution of this Commonwealth or as set forth in a statute.

Amended May 3, 1996, effective July 1, 1996; November 28, 2007, effective March 1, 2008.

Reporter's Notes (2008): Rule 42(d) has been amended to add language that appears in Rule 42(b) regarding the constitutional right to trial by jury. In light of the 2003 legislation transferring various divisions of the District Court Department located in Suffolk County to the Boston Municipal Court Department and with the creation of divisions in the Boston Municipal Court Department (G.L. c. 218, s. 1 and G.L. c. 218, s. 50), Rule 42(c) and Rule 42(d) are also applicable in the Boston Municipal Court Department.

Reporter's Notes (1996): The amendments to Rule 42 effective in 1996 add new sections (c) and (d), applicable in the District Court, and retitle the headings to Rule 42(a) and (b). New sections (c) and (d) of Rule 42 correspond respectively to now repealed Rule 42(a) and (b) of the Dist./Mun.Cts.R.Civ.P.

The "Comments" to now repealed Rule 42(a) of the Dist./ Mun.Cts.R.Civ.P. describe the District Court provisions by noting that under District Court Rule 42(a) (now Mass. R.Civ.P. 42(c)), the first paragraph governs only consolidation of cases pending in a single District Court, while the second paragraph governs consolidation of actions pending in two or more District Courts.

The "Comments" to now repealed Rule 42(b) of the Dist./ Mun.Cts.R.Civ.P. describe the District Court provisions by noting that District Court Rule 42(b) (now Mass.R.Civ.P. 42(d)) does not contain the power of one District Court to separate claims or issues in a case before it and order that any such claims or issues be heard in a different District Court. Such power does exist for other courts governed by the Mass.R.Civ.P. pursuant to section (b) as retitled. The "Comments" finally point out that District Court Rule 42(b) (now Mass.R.Civ.P. 42(d)) does not contain language dealing with trial by jury.

Reporter's Notes (1973): Except for the language pertaining to counties, Rule 42(a) tracks Federal Rule 42(a). By authorizing the court to order a joint trial of any or all the matters in issue in the actions or to order all the actions consolidated, it complements the liberal provisions for permissive joinder of claims (Rule 18) and of parties (Rule 20).

Under Rule 42(a) the court's order may apply to separate issues and not necessarily to entire cases. For example, if several plaintiffs are suing the same defendant for injuries arising from the same accident, the court may order a joint trial on the issue of liability, leaving the issue of damages to be determined separately in each case, should the liability issue be determined against the defendant. See Hassett v. Modern Maid Packers, Inc., 23 F.R.D. 661 (D.Md.1959). Where however the issues of liability and damages are significantly related, it has been held error to order a separate trial of the liability issue. United States Air Lines, Inc. v. Wiener, 286 F.2d 302 (9th Cir.1961).

Rule 42(a) does permit the consolidation of separate actions seeking legal and equitable relief as concomitant of the merger of law and equity effected by Rule 2. It also changes 1.1E. past practice, Stoneman v. Coakley, 266 Mass. 64, 65-66, 164 N.E. 802, 803

(1929), by permitting, in any appropriate situation, consolidation for trial of two cases pending in different counties.

Rule 42(b) is necessary primarily because of the liberal joinder provisions of Rules 18 and 20. The authority in the court to order separate trials is necessary in some cases to avoid unwieldy litigation.

Rule 43: Evidence

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of this Commonwealth or under the rules of evidence applied in this Commonwealth. The competency of a witness to testify shall be determined in like manner.

(b) Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, except by evidence of bad character, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief. Any other witness may be cross-examined without regard to the scope of his testimony on direct, subject only to the trial judge's sound discretion.

(c) Record of Excluded Evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation under the penalties of perjury may be accepted in lieu thereof.

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(f) Interpreters. The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by

one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

(g) Examination of Witnesses. Unless otherwise permitted by the court, the examination and cross-examination of any witness shall be conducted by one attorney only for each party. The attorney shall stand while so examining or cross-examining unless the court otherwise permits.

Effective July 1, 1974.

Reporters' Notes (1973): Except for the deletion of material which is inapplicable to state practice, Rule 43(a) tracks its federal counterpart. Rule 43(a) does not affect Massachusetts law since it incorporates existing law on the admissibility of evidence and the competency of witnesses.

Rule 43(b) follows Federal Rule 43(b). It does not alter Massachusetts practice, which (1) allows interrogation of a hostile witness by leading questions, Commonwealth v. Monahan, 349 Mass. 139, 207 N.E.2d 29 (1965); Commonwealth v. Coshnear, 289 Mass. 516, 194 N.E. 900 (1935); (2) allows an adverse party to be called and cross-examined, G.L. c. 233, s. 22; (3) allows a corporate officer or agent to be examined as an adverse party, G.L. c. 238, s. 22; (4) permits the adverse party's impeachment, except as to character, G.L. c. 233, s. 23; Labrie v. Midwood, 273 Mass. 578, 581-582, 174 N.E. 214, 216 (1931); and (5) normally permits the adverse party-witness to be "cross-examined" by his own attorney only upon the subject matter of the direct examination. Phillips v. Vorenberg, 259 Mass. 46, 73, 156 N.E. 61, 65 (1927). The final sentence of Rule 43(b) makes it clear that any other witness may be cross-examined without regard to the scope of his testimony on direct, Moody v. Rowell, 34 Mass. (17 Pick.) 490, 498 (1835), subject only to the trial judge's sound discretion, Commonwealth v. Granito, 326 Mass. 494, 95 N.E.2d 539 (1950).

Rule 43(c) is similar to prior Massachusetts practice. If an objection to the admission of evidence is sustained, the proponent of the evidence should make an offer of proof, to preserve the record. See Petition of Mackintosh, 268 Mass. 138, 139, 167 N.E. 273, 274 (1929); cases collected in Hughes, Massachusetts Evidence, 240-242 (1961). Note that if the evidence is excluded on cross-examination, the offer of proof need not be made. Stevens v. William, S. Howe Co., 275 Mass. 398, 402, 176 N.E. 208, 210 (1931).

Rule 43(d), dealing with oaths, is basically the same as G.L. c. 288, s.s. 15 to 19.

Rule 43(e) is supported by Super.Ct. Rule 46, although the latter does not specifically allow the introduction of oral testimony or depositions.

Rule 43(f), dealing with interpreters, follows Federal Rule 43(f). Massachusetts appears not to have had any settled practice on this question.

Rule 43(g) which does not appear in the Federal Rules, is taken virtually verbatim from Super.Ct. Rule 51, and embodies long-settled Massachusetts courtroom etiquette.

Reporter's Notes (1996): As result of the merger of the District Court rules into the Mass.R.Civ.P., Rule 43(c) has been made applicable to District Court proceedings.

Rule 44: Proof of Official Records

a) Authentication.

(1) Domestic. An official record kept within the Commonwealth, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record, or by his deputy. If the record is kept in any other state, district, commonwealth, territory or insular possession of the United States, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, any such copy shall be accompanied by a certificate that such custodial officer has the custody. This certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification, or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof, by any other method authorized by law, of the existence of, or the lack of, an official record, or of entry, or lack of entry therein.

Effective July 1, 1974.

Reporters' Notes (1973): Rule 44, like Federal Rule 44, deals only with the problems of (1) authenticating an official record, and (2) establishing the lack of such record. Rule 44 does not cover the authentication of non-official records (as, e.g., hospital records under G.L. c. 233, s. 79). Neither does it regulate the extent to which the contents of the record, once authenticated, may be admissible (as, e.g., the question of "liability" evidence in hospital records, G.L. c. 233, s. 79, or death records, G.L. c. 46, s. 19).

Rule 44 largely follows Federal Rule 44, with one significant exception. Federal Rule 44(a)(1) requires that any official record be doubly-certified: (1) The officer having custody of the record must certify its validity; (2) The judge or officer must certify the status of the custodial officer. Rule 44(a)(1) eliminates this double certification with respect to records kept within the Commonwealth. In other respects, Rule 44 accords with prior Massachusetts practice. See G.L. c. 233, secs. 75-79G.

Rule 44(a)(2) deals with foreign records. It does not alter prior Massachusetts practice. G.L. c. 233, s. 69, G.L. c. 223A, s. 13. Rule 44(b) allows a lack of record to be proved in the same manner as proof of the existence of an official record.

Rule 44(c) modifies Federal Rule 44(c) slightly to make clear that proof of either the existence of a record, or lack of such record, or entries therein may be proved by methods other than those set out in sections (a) and (b). Thus the ease law in Massachusetts permitting proof of the absence of a record or entry therein by parol evidence remains unaffected. See Bristol County Savings Bank v. Keary, 128 Mass. 298,303 (1880); Blair's Foodland, Inc. v. Shuman's Foodland, Inc., 311 Mass. 172, 175-176, 40 N.E.2d 303, 305-306 (1942).

Rule 44.1: Determination of Foreign Law

A party who intends to raise an issue concerning the law of the United States or of any state, territory or dependency thereof or of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining such law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

Effective July 1, 1974.

Reporters' Notes (1973): Rule 44.1 is similar to Federal Rule 44.1, which was added to the Federal Rules in 1966. The Reporters have extended the provisions of Federal Rule 44.1 to encompass the law of the United States or any other state, territory or dependency of the United States.

Rule 44.1 does not significantly alter pre-rule practice. G.L. c. 233, s. 70 provides: "The courts shall take judicial notice of the law of the United States or of any state, territory or dependency thereof or of a foreign country whenever the same shall be material." While

the word "shall" is used in G.L. c. 233, s. 70, the court need not take judicial notice of the law of a foreign jurisdiction unless it is brought to the court's attention. Tsacoyeanes v. Canadian Pacific Railway Co., 339 Mass. 726, 728, 162 N.E.2d 23, 24 (1959). This judicial requirement is not satisfied simply by mentioning the appropriate reference to foreign law. "Merely to direct attention to the law of a foreign country written in a foreign tongue does not make it a matter for judicial notice." Rodrigues v. Rodrigues, 286 Mass. 77, 83, 190 N.E. 20, 22 (1934).

In New England Trust Co. v. Wood, 326 Mass. 239, 243, 98 N.E.2d 547, 549 (1950) the court, while holding that it could take judicial notice of the Turkish law of descent and distribution, although not brought to its attention by the parties, refused to do so because it was not equipped to make its own investigation of Turkish law. It is unlikely that Rule 44.1 affects the philosophy of these holdings.

Rule 44.1 permits the court to consider "any relevant material or source"; this follows Massachusetts practice. The trial judge's attention may be directed to the law of another jurisdiction by oral testimony of a qualified witness as well as by citation of statutes and decisions. Eastern Offices, Inc. v. P.F. O'Keefe Advertising Agency, Inc., 289 Mass. 23, 26, 193 N.E. 837, 838 (1935). See also Petition of Mazurowski, Petitioner, 331 Mass. 33, 3849, 116 N.E.2d 854, 857-858 (1954), which approved the Probate Court's (and the Supreme Judicial Court's) obtaining information from various United States government departments; Lenn v. Riche, 331 Mass. 104, 109, 117 N.E.2d 129, 132 (1954) (French Code and commentaries).

The last sentence of Rule 44.1 is designed to make clear that the trial court's determination of foreign law is a matter of law (and therefore reversible if the appellate court disagrees) not a finding of fact, which may be reversed only if the appellate court decides that the trial court was "clearly erroneous." See Rule 52.

Rule 45: Subpoena

(a) For Attendance of Witnesses; Form; Issuance. Every subpoena shall be issued by the clerk of court, by a notary public, or by a justice of the peace, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to do the following at a specified time and place: to attend and give testimony; to produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or to permit inspection of premises. The clerk, notary public, or justice of the peace shall issue a subpoena signed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information. A command to produce documents, electronically

stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the documents, electronically stored information, or tangible things. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials. A person commanded to produce documents, electronically stored information, or tangible things, or to permit inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(c) Service. A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person, or by exhibiting it and reading it to him, or by leaving a copy at his place of abode; and, if the person's attendance is required, by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or the Commonwealth or a political subdivision thereof, or an officer, or agency of either, fees and mileage need not be tendered.

(d) Subpoenas for Taking Deposition and for Command to Produce; Place of Examination.

(1) No subpoena for the taking of a deposition shall be issued prior to the service of a notice to take the deposition. If a subpoena commands only the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a copy of the subpoena shall be served on each party. The party serving a subpoena requiring production or inspection before trial shall also serve on each party a copy of any objection to the commanded production or inspection and a notice of any production made or, alternatively, provide a copy of the production to each party. The subpoena commanding the person to whom it is directed to produce documents, electronically stored information, or tangible things, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by these rules, is subject to the provisions of Rule 26(c) and subdivision (b) of this rule. A subpoena upon a party which commands the production of documents, electronically stored information, or things must give the party at least 30 days for compliance after service thereof. Such

subpoena shall not require compliance of a defendant within 45 days after service of the summons and complaint on that defendant. The court may allow a shorter or longer time. A person commanded to produce documents or tangible things or to permit inspection may within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the party or attorney designated in the subpoena written objection to inspecting, copying, testing, or sampling any of the materials; to inspecting the premises; or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection is made, move at any time upon notice to the commanded person for an order compelling production or inspection. Such an order to compel production or inspection shall protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance.

(2) Unless the court orders otherwise, other than for a hearing or trial, a resident of this Commonwealth shall not be required to attend an examination or produce documents, electronically stored information, or tangible things at a place more than 50 airline miles distant from either his residence, place of employment, or place of business, whichever is nearest to the place to which he is subpoenaed. Other than for a hearing or trial, a nonresident of the Commonwealth when served with a subpoena within the Commonwealth may be required to attend or produce documents, electronically stored information, or tangible things only in that county wherein he is served, or within 50 airline miles of the place of service, or at such other convenient place as is fixed by an order of court.

(e) Subpoena for a Hearing or Trial. At the request of any party subpoenas for attendance or to produce documents, electronically stored information, or tangible things at a hearing or trial shall be issued by any of the persons directed in subdivision (a) of this rule. A subpoena requiring the attendance of a witness or production of documents, electronically stored information, or tangible things at a hearing or trial may be served at any place within the Commonwealth.

(f) Duties in Responding to a Subpoena

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena that requires production of documents shall produce them as they are kept in the ordinary course of business or shall organize and label them to correspond to the categories in the demand. Other than for a deposition, hearing, or trial, unless the production of original documents is requested, the producing party may produce copies of the documents, including by electronic means, provided that, if

requested, the producing party affords all parties a fair opportunity to verify the copies by comparison with the originals.

(B) Form for producing electronically stored information not specified. If a subpoena does not specify a form for producing electronically stored information, the person responding shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically stored information produced in only one form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible electronically stored information. The person responding may object to the discovery of inaccessible electronically stored information, and any such objection shall specify the reason that such discovery is inaccessible. On motion to compel or for a protective order, the person claiming inaccessibility bears the burden of showing inaccessibility. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(f)(4)(C) and (D) . The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material shall make the claim expressly and provide information that will enable the parties to assess the claim. A privilege log need not be prepared, except by agreement or order of the court.

(B) Information mistakenly produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. The provisions of Rule 26(b)(5)(B) and (C) are applicable.

(3) Further Protection. Any person subject to a subpoena under this rule may move the court:

(A) for a protective order under rule 26(c) or

(B) to be deemed entitled to any protection set forth in any discovery or procedural order previously entered in the case.

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court in which the action is pending.

Amended August 3, 1982, effective January 1, 1983; November 17, 1986, effective January 1, 1987; September 24, 2013, effective January 1, 2014; January 29, 2015, effective April 1, 2015.

Reporter's Notes (2015)

Background to 2015 Amendments

In 2013, the Standing Advisory Committee on the Rules of Civil Procedure of the Supreme Judicial Court (Standing Advisory Committee) undertook a review of Rule 45 governing subpoenas. Two matters that prompted the Committee to undertake this review were changes to Rule 45 of the Federal Rules of Civil Procedure effective December 1, 2013 and changes to Rule 45 of the Massachusetts Rules of Civil Procedure resulting from a series of rules amendments that dealt with discovery of electronically stored information effective January 1, 2014.

The most significant change in Rule 45 as result of this review was the adoption for Massachusetts practice of a “documents only” subpoena directed to a non-party, a practice that has existed under the Federal Rules of Civil Procedure since 1991.

Without the formal rules-based ability to subpoena documents from a non-party, Massachusetts lawyers have accomplished a result similar to that allowed under the Federal Rules by resorting to a practice of noticing the deposition of a keeper of records together with a deposition subpoena that required the production of documents at the deposition. See Rules 30(b)(1) and 45(d) (prior to the instant amendment). As long as there was no need to depose the keeper of records and only a desire to obtain the requested documents, the party seeking the discovery would agree to “waive” the appearance at the deposition if the documents themselves were produced. With the adoption of a documents only subpoena in 2015, there is no longer a need in Massachusetts to use deposition practice in regard to a non-party for the sole purpose of document production.

Other changes were made to Rule 45 to bring the rule up-to-date and to make the rule consistent with current subpoena practice.

The 2015 Amendments

A number of changes have been made to Rule 45 to deal with the dual nature of the subpoena-- to command the appearance of a non-party witness and to command production of documents, etc. from the non-party witness. The following is a section-by-section analysis describing the significant changes.

Rule 45(a).

As amended, Rule 45(a) states that a subpoena may command a person, in addition to giving testimony, "to produce designated documents, electronically stored information, or tangible things in that person's possession, custody or control; or to permit inspection of premises" and to do so "at a specified time and place." The addition of the quoted language formally adopts the concept of a documents only subpoena for Massachusetts civil practice. A specific reference to electronically stored information has been added, consistent with other changes made to the discovery rules in 2014 regarding discovery of electronically stored information. The language added to Rule 45(a) has been adapted from Rule 45(a)(1)(A)(iii) of the Federal Rules of Civil Procedure.

Rule 45(b).

As revised, this rule implements the documents only provisions of the new rule. The new title to Rule 45(b) and language that a command to produce documents, etc. may be included in a subpoena to attend a deposition or in a separate subpoena are taken from Rule 45(a)(1)(C) of the Federal Rules of Civil Procedure. The last sentence of the revised rule makes clear that a command to produce documents, etc. does not require the person upon whom it is served to "appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial." See Rule 45(d)(2)(A) of the Federal Rules of Civil Procedure.

Rule 45(c).

Rule 45(c), dealing with service of the subpoena, makes clear that the requirement of tendering of fees to the person served with the subpoena applies only if the person's attendance is commanded and does not apply if the subpoena commands production only.

Rule 45(d).

A provision has been added to Rule 45(d)(1) that prior to service of a documents only subpoena before trial, a copy of the subpoena must be served on each party. This language differs from Rule 45(a)(4) of the Federal Rules of Civil Procedure, which requires that both a notice and a copy of the subpoena to be served on each party. The Massachusetts version reflects the belief that the requirement of a notice in addition to a copy of the subpoena is not needed. Service of a copy of the subpoena will provide sufficient notice to allow other parties to monitor discovery and to raise any objection to the subpoena.

The party serving the subpoena must also serve on all parties to the case a copy of any objection received to the subpoena as well as a notice of any production made or alternatively, a copy of the production. Similar requirements do not appear in the Federal Rules. The Massachusetts addition was provided so that parties to the case, other than the party who served the subpoena, are aware of the scope of production and are aware of

any objection to production made by the non-party who has been served with the subpoena. The language also gives the option to the party who receives the documents to provide copies of the documents to the other parties, as often was the prior practice.

The last paragraph of Rule 45(d)(1) states that if there is an objection to production by the person served with the subpoena, the party seeking production may move to compel production. "Such an order to compel production or inspection shall protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance." This quoted language in the Massachusetts rule differs from the cognate provision in Rule 45(d)(2)(B)(ii) of the Federal Rules of Civil Procedure. The federal rule provides that an order of production must protect the person "from significant expense resulting from compliance."

This is an intentional variation from the federal rules. The Massachusetts version adopts the same language that was added to Rule 45(b) in connection with the 2014 amendments regarding electronically stored information. A party issuing a subpoena is required to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Rule 45(b), as amended effective January 1, 2014. The 2014 Reporter's Notes to the Massachusetts amendments described the philosophy behind the language "undue burden or expense" as follows:

It is a recognition of the burden involving time and expense that a subpoena imposes upon a third person, often with no stake in the outcome and often without counsel. Although this provision has been added in connection with amendments that relate to electronic discovery, the requirement of taking steps to avoid undue burden and expense is not limited to subpoenas involving electronically stored information.

The Massachusetts language is intended to provide judges with broad discretion on a case-by-case basis to deal with the burden on a non-party to a case, and the possible expense, involved in responding to a subpoena. Its language is sufficiently broad to allow a court to require cost-sharing in its discretion as part of an order to produce.

The title of Rule 45(d) has also been revised to reflect the new procedure for a documents only subpoena.

Rule 45(e).

The pre-2015 version of Rule 45(e) dealt with a subpoena requiring attendance at a hearing or trial. The 2015 amendments added language making this provision applicable as well to a subpoena requiring production of documents, etc.

Rule 45(f).

A sentence has been added to Rule 45(f)(1)(A) to address the question whether copies of documents or originals of documents must be produced in response to a subpoena. The sentence states that in the case of a documents only subpoena, the producing person may produce copies of the documents, unless originals were requested in the command. However, if requested, the producing party must provide "all parties a fair opportunity to verify the copies by comparison with the originals."

This sentence is not in the federal rules. It is intended to recognize the general practice in Massachusetts of producing copies of documents, and not the originals, other than at a deposition, hearing, or trial. This is consistent with the procedure applicable where documents are produced in connection with a deposition and the producing party desires to retain the originals. Rule 30(f)(1), second paragraph, provides that under such circumstances, the producing party may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition.

The sentence provides that copies may be produced "by electronic means." This language recognizes the benefits of producing copies by such methods as electronic transfer of files by e-mail, CD-ROM, or Internet connection.

The last sentence of Rule 45(f)(1)(2)(A) has been amended to provide that even though a privilege log is not required in the case of a subpoena to a third person where there is an objection on the basis of privilege, the parties may agree to the preparation of a privilege log or the court may so order.

Rule 45(g).

There are no changes to Rule 45(g) dealing with contempt for failure to obey a subpoena.

(2014) The 2014 amendments to Rule 45 were part of a series of amendments concerning discovery of electronically stored information. For background, see the 2014 Reporter's Notes to Rule 26 .

The 2014 amendments relating to electronically stored information have resulted in a number of changes to Rule 45.

Language has been added to Rule 45(b) recognizing a duty on the party issuing a subpoena to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." This language makes the Massachusetts rule similar to its federal counterpart. It is a recognition of the burden involving time and expense that a subpoena imposes upon a third person, often with no stake in the outcome and often without counsel. Although this provision has been added in connection with amendments that relate to electronic discovery, the requirement of taking steps to avoid undue burden and expense is not limited to subpoenas involving electronically stored information.

References to "electronically stored information" have been added to Rule 45(b) and (d).

Existing Rule 45(f) (contempt) has been redesignated as Rule 45(g).

Rule 45(f), taken from Rule 45(d) of the Federal Rules of Civil Procedure, has been added. Rule 45(f) sets forth procedures applicable to producing documents, including electronically stored information.

Rule 45(f)(2) is modeled after Rule 45(d)(2)(A) of the Federal Rules of Civil Procedure, but with the added proviso that a person subpoenaed need not prepare a privilege log, a recognition of the burden that otherwise would be imposed on a non-party claiming a privilege.

Rule 45(f)(2)(B), dealing with information mistakenly produced that is subject to a claim of privilege or protection, incorporates the "clawback" provisions and procedures set forth in Rule 26(b)(5)(B) and (C) .

(2008) In 2008, Rule 26(b)(5) was amended to require the production of a privilege log by a party who makes a claim of privilege or protection in response to a discovery request. The requirement of a privilege log applies to a claim of privilege or right to protection asserted by a party only. Rule 26(b)(5) imposes no obligation to produce a privilege log on the part of a non-party who withholds information after service of a subpoena for the production of documentary evidence under Rule 45(b), although a court would appear to have authority to order preparation of a log.

(1986) This amendment makes clear that a deposition subpoena can require, in addition to production, permission to inspect and copy designated books, papers, documents, or tangible things. The amendment brings the Massachusetts Rule closer to the wording of Fed.R.Civ.P. 45(d).

(1983) This amendment makes clear that one cannot circumvent the time periods in Rule 30(b)(5) and Rule 34(b) by serving a deposition subpoena duces tecum on another party. A subpoena is unnecessary to compel a party to appear or to produce documents at a party's deposition. See Rules 37(d) and 30(b)(5) .

(1973) Rule 45 closely follows Federal Rule 45 with changes to coincide with prior Massachusetts practice. In these Rules, the word "subpoena" is the equivalent of "witness summons" in prior Massachusetts practice. The word "summons" in these Rules always means "summons of complaint." The first sentence of Rule 45(a) embodies the provisions of G.L. c. 233, § 1:

A clerk of a court of record, or notary public or a justice of the peace may issue summonses for witnesses in all cases pending before courts. . . .

Rule 45(b) incorporates the familiar Massachusetts practice of issuing subpoenas duces tecum. The rule specifically allows the subpoena to be used to command the production of books, papers, documents or tangible things. The section incorporates a protective device on behalf of the person to whom the subpoena is addressed. By motion made promptly, the producent can have the court modify or quash the subpoena if it is unreasonable and oppressive, or require the party seeking the production to pay the costs thereof. Quashing or modifying a subpoena which is unreasonable is well established in Massachusetts practice. See Finance Commission of the City of Boston v. McGrath, 343 Mass. 754 , 765 (1962); Bull v. Loveland, 27 Mass. 9 (1830). Observe the relation between Rule 45(b) and Rule 26(c) , which gives the person served with a notice for the taking of a deposition the right to move the court for appropriate relief, including an order that the deposition may not be taken or that it may be taken only at some designated place, or that the scope of inquiry be limited. Rule 45(b)(1) gives a non-party under a subpoena duces tecum the right to seek a protective order. Without the language of Rule 45(b)(1), a non-party subpoenaed merely to force the production of documents (as, for example, the custodian of records of a hospital) would not be explicitly empowered to seek appropriate court relief-, indeed, the silence of the rules on the point might be interpreted to mean that he has no such right. The language of Rule 45(b)(1) is designed to eliminate all such confusion.

Rule 45(c) allows service of a subpoena to be made by any non-party who is over 18 years of age. This accords with G.L. c. 238, § 2 which allows service of a summons to be made "by an officer qualified to serve civil process or by a disinterested person." Both statute and rule thus permit service by a party's attorney. Although permissible, this practice may be unwise cf. ABA, Canons of Professional Ethics, Canon 19; ABA Code of Professional Responsibility DR 5-102; EC 5-9, 5-10.

Rule 45(c) permits service to be made in accordance with pre-rule Massachusetts practice. See G.L. c. 233, § 2 . The requirement that the fees be tendered to the witness accords with G.L. c. 233, § 3 :

No person shall be required to attend as a witness in a civil case . . . unless the legal fees for one day's attendance and for travel to and from the place where he is required to attend are paid or tendered to him.

Rule 45(d) provides the mechanism for using a subpoena to compel the attendance of a witness at a deposition. It also permits the subpoena to be used to compel the deponent to produce at the deposition designated papers, documents, books or tangible things. Such use of a subpoena is not intended to circumvent whatever good-cause-for-production requirements may remain in the discovery rules, at least as to parties. Rule 45(d)(1) indeed gives a non-party deponent substantially all the objection-rights of a party. A subpoena for the attendance of a witness at a deposition may not be issued without a showing that service of notice to take a deposition as provided for in the discovery rules has been made.

Rule 45(d)(1) regulates the place-of-taking-of in Massachusetts depositions only. It does not attempt to regulate the problem of enforcement of subpoenas out-of-state. Whether the state will honor a Massachusetts subpoena is a question that depends on reciprocal arrangements between Massachusetts and the state in question, and must be resolved ad hoc. Presumably, the state enforcing the Massachusetts subpoena will in its order of enforcement make explicit the place where the deposition is to be taken. An in-state deponent may not be summoned to a deposition more than 50 miles from where he lives or works. The mileage is specified in airline (i.e., straight-line) terms in order to obviate disputes over road distances.

Rule 45(e) provides that a subpoena shall issue as a matter of course upon the request of any party. This section is applicable to bearings as well as trials and follows pre-rule Massachusetts practice. See G.L. c. 233, §§ 1, 7, 8 .

Rule 45(f) likewise works no change in Massachusetts practice; it preserves the existing law as to penalties for failure to comply with the requirements of a subpoena. Failure of a party to submit to discovery is also punishable by an appropriate order under Rule 37.

Rule 46: Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or

order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Effective July 1, 1974.

Reporter's Notes (1996): Rule 46 has been applicable in the District Court since the adoption of the District/Municipal Courts Rules for Appellate Division Appeal in 1994. Note that under the terms of this rule, no objection is necessary in the District Court to preserve for appeal rulings made by the court in response to written requests for rulings. See Rule 64A of these rules.

Reporter's Notes (1973): Under Rule 46, which is identical to Federal Rule 46, a party need no longer mouth the magic word "exception" to save his right to review a questionable ruling by the trial judge. The party must merely clearly indicate to the court what he wants the court to do or object to the action of the court stating his grounds therefor.

Although Rule 46 presumes the requirement of objection, it does eliminate exceptions and bills of exceptions. This severely changes Massachusetts practice, where an objection was considered a mere preliminary gesture indicating to the judge that alleged error was about to occur. Thus the opposing party was warned of the possibility of error so that he might correct the defect, if he could and would, and the trial judge was given an opportunity to exercise his judgment on the contention. An objection in Massachusetts formerly preserved no rights. That could be done only by claiming an exception following an adverse ruling on an objection. Consequently, an exception, properly taken and preserved, was necessary and sufficient to obtain appellate review of a question; an objection, although a necessary basis of an exception, Mouradian v. Giblin, 254 Mass. 478, 479, 150 N.E. 215 (1926), did not suffice to obtain review, Leyland v. Pingree, 134 Mass. 367, 370 (1883).

Under Rule 46, these purposes are served entirely by an objection. The same specificity formerly required in taking an exception, Graunstein v. Boston & Me. R.R., 317 Mass. 164, 167, 57 N.E.2d 570, 572 (1944) would under Rule 46 be required in making an objection. See Maulding v. Louisville & Nashville R. Co., 168 F.2d 880 (7th Cir.1948). General objections are regarded with the same disfavor as general exceptions used to be and will be found adequate only if the grounds cannot possibly be misunderstood. See Johnston v. Reily, 160 F.2d 249 (D.C.1947). Without a specific objection and a ruling on it, the appellate court under Rule 46 will generally not review the question, any more than it would review an overruled objection to which under prior practice a specific exception was not taken. In the federal system, if the trial court has committed "fundamental error" (sometimes called "plain error"), the Court of Appeals may review the point, even though

no objection was raised below. See Sibbach v. Wilson, 312 U.S. 1, 16, 61 S.Ct. 422, 427, 85 L.Ed. 479 (1941). Massachusetts does not follow the "fundamental error" doctrine. The Reporters know no case in which the Supreme Judicial Court has allowed late-claimed error to affect the outcome. The closest the Court has come to considering such error was Newell v. West, 149 Mass. 520, 531-532, 21 N.E. 954, 958-959 (1889), where a "purely clerical" error in an account was corrected on appeal, even though not questioned below.

Rule 47: Jurors

(a) Examination of Jurors. The trial judge shall examine on oath all persons called as jurors, in each case, and shall ask: (1) whether any juror or any member of his family is related to any party or attorney therein; (2) whether any has any interest therein; (3) whether any has expressed any opinion on the case; (4) whether any has formed any opinion thereon; (5) whether any is sensible of any bias or prejudice therein; and (6) whether any knows of any reason why he cannot or does not stand indifferent in the case. The jurors shall respond to each question separately before the next is propounded. The trial judge may submit, of his own motion or on that of any party, such additional questions as he deems proper. The trial judge may also, on motion of any party, permit the parties or their attorneys to make such further inquiry of the jurors on oath as he deems proper.

(b) Courts Other Than District Courts: Additional Jurors. The court may order impanelled a jury of not more than sixteen members and the court shall have jurisdiction to try the case with such jury as provided by law. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 additional jurors are to be impanelled, and 2 peremptory challenges if 3 or 4 additional jurors are to be impanelled.

(c) District Court: Additional Jurors. The court may order impanelled a jury of not more than eight members and the court shall have jurisdiction to try the case with such jury as provided by law. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 additional jurors are to be impanelled.

Effective July 1, 1974. Amended November 28, 2007, effective March 1, 2008.

Reporter's Notes (2008): Rule 47 has been amended to add an additional section (c) dealing with six person juries in the District Court. Rule 47(b) applies to all courts other than the District Court.

New Rule 47(c) provides for impanelling up to eight jurors. The statewide one trial statute provides that the number of peremptory challenges is two for each party. G.L. c. 218, s. 19(B)(c).

Reporter's Notes (1996): With the merger of the District Court rules into the Mass.R.Civ.P., Rule 47 has been made applicable to the District Court, to the extent that Massachusetts law permits trial by jury in District Court civil actions.

Reporter's Notes (1973): Rule 47(a) changes Federal Rule 47 and clarifies ambiguities in the controlling statute, G.L. c. 234, s. 28. The statute reads in part:

"Upon motion of either party, the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein; and the objecting party may introduce other competent evidence in support of the objection. If the court finds that the juror does not stand indifferent in the case, another shall be called in his stead."

Rule 47(a) makes clear that the court, rather than the clerk, is required to ask certain questions. Prior practice, which permitted the clerk to ask the questions, did not convey to the jurors with necessary clarity the significance of the questions. Rule 47(a) has been divided into numbered classes. The court is to ask each question separately; the jurors are to respond to each question before the judge propounds the next question.

The questions themselves are taken from G.L. c. 234, s. 28, Rule 47(a)(1) emphasizes not merely relation to a party, but to a participating attorney; this last relationship may be as productive of prejudice as relation to a party. Rules 47(a)(2), (3), (4) and (5) are taken almost verbatim from the statute. Rule 47(a)(6) is a catchall designed to ensure that each juror has an opportunity, under judicial interrogation, to reveal any reason for his disqualification not covered by the rest of the rule.

The final sentence of Rule 47(a) allows the court to permit the parties or attorneys to make whatever direct inquiry the court may deem proper.

Rule 47(a) further permits the court to submit to the jurors any question in addition to the six specified questions.

An addition to G.L. c. 234, s. 28, enacted in 1973 (see Chapter 919 of the Acts of 1973), provides that

"if it appears that, as a result of the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons, the juror may not stand indifferent, the court may, or the parties or their attorneys may, with the permission and under the direction of the court, examine the juror specifically with respect to such considerations, attitudes, exposure, opinions or any other matters which may, as aforesaid, cause a decision or decisions to be made in whole or in part upon issues extraneous to the issues in the case. Such examination may include a

brief statement of the facts of the case, to the extent the facts are appropriate and relevant to the issues of such examination, and shall be conducted individually and outside the presence of other persons about to be called as jurors or already called."

Such additional questions would be likewise authorized by the last two sentences of Rule 47(a).

The procedure under Rule 47(a) applies to any juror called to replace any juror challenged or otherwise excused, as well as to any alternate jurors.

The net effect of Rule 47(a) will be:

(1) Initial questions will be asked by the judge;

(2) The judge on his own motion or on motion of the parties may ask any further questions; and

(3) On motion of a party the judge may (but need not) permit limited voir dire.

Under Federal Rule 47(b) the court may direct that not more than six additional jurors may be called and impanelled. Rule 47(b) adopts the existing Massachusetts practice of four additional jurors, G.L. c. 234, s. 26B. Federal Rule 47(b) requires all the additional jurors to be impanelled as designated alternate jurors; under Massachusetts practice those jurors who are designated as alternate jurors, with the exception of the foreman, are not determined until the case is ready for submission to the jury. Rule 47(b) follows the Massachusetts approach; a juror is likely to be more attentive if it is probable that he will be called upon to participate in reaching a verdict.

Also, under Federal Rule 47(b), an alternate juror who does not replace a regular juror must be discharged after the jury retires to consider its verdict. Under Massachusetts practice, as incorporated in Rule 47(b), even after the case has been submitted to the jury, if a juror is unable to perform his duty, an alternate juror will be selected and the jury will renew its deliberations with the alternate juror.

Rule 48: Number of Jurors -- Majority Verdict

The parties may stipulate that the jury shall consist of any number less than twelve, or less than six in the District Court, or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

Effective July 1, 1974. Amended November 28, 2007, effective March 1, 2008.

Reporter's Notes (2008): The title of Rule 48 has been changed to "Number of Jurors--Majority Verdict" in light of the fact that there are six-person juries in the District Court. The language of Rule 48 has likewise been amended.

Reporter's Notes (1996): With the merger of the District Court rules into the Mass.R.Civ.P., Rule 48 has been made applicable to the District Court, to the extent that Massachusetts law permits trial by jury in District Court civil actions.

Reporters' Notes (1973): Rule 48 is the same as Federal Rule 48. Its provisions should be read in connection with Mass.G.L. c. 234, s.s. 34A and 34B. Under section 34A, an agreement of five-sixths of the jury suffices to render a verdict. Under section 34B, if during trial a juror is unable to perform his duty for good cause (e.g.-death, illness) the trial may proceed with the remaining jurors, except that no trial may proceed with less than ten jurors unless the parties agree to the lesser number.

Rule 49: Special Verdicts and Interrogatories

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Effective July 1, 1974.

Reporter's Notes (1996): With the merger of the District Court rules into the Mass.R.Civ.P., Rule 49 has been made applicable to the District Court, to the extent that Massachusetts law permits trial by jury in District Court civil actions.

Reporter's Notes (1973): Rule 49, identical to Federal Rule 49, prescribes two special methods by which the court may submit issues of fact to a jury: the special verdict, and the general verdict accompanied by answers to interrogatories. Under Rule 49(a) the court may require a jury to return only a special verdict. The issue may be put to the jury under this rule in one of three ways: (1) It may submit written questions; (2) it may submit written alternative special findings (so long as they are within the pleading and evidence), or (3) it may use such other method as it deems "appropriate."

If the court omits any issue of fact, each party waives his right to trial by jury as to that issue unless he objects before the jury retires. The court may make a finding as to that issue; if it fails to make any finding, the issues will be deemed to have been decided in accordance with the judgment on the special verdict. Palmiero v. Spada Distributing Co., 217 F.2d 561 (9th Cir.1954).

The special verdict, well known in Massachusetts practice, originated in common law. See Frati v. Jannini, 226 Mass. 430, 431, 115 N.E. 746, 747 (1917). It is recognized by G.L. c. 231, § 124, G.L. c. 231A, § 1 (declaratory judgment) and G.L. c. 231, § 85 (comparative negligence). Except for cases falling under Mass.G.L. c. 231, § 85 (comparative negligence), under prior practice the trial judge had full discretion to determine whether or not the jury should return a general or a special verdict, Stone v. Orth Chevrolet Co., Inc., 284 Mass. 525, 528, 187 N.E. 810, 812 (1933). The Reporters have found no limitation on the court's discretion as to the form or nature of the questions to be presented to the jury other than Mass.G.L. c. 231, § 85, supra, requiring the jury to find: (1) the amount of damages which would have been recoverable had there been no contributory negligence; and (2) the degree of negligence of each party expressed as a percentage.

The provision of Rule 49(a) that a party waives his jury right pro tanto if any issue is not submitted by the court to the jury is new to Massachusetts, as is the provision permitting the judge to find the facts of any such non-submitted issue. In Fitzgerald v. Young, 225 Mass. 116, 121, 113 N.E. 777, 778-779 (1916) the judge failed to submit an issue of material fact to the jury. The jury returned with findings tending to show that the defendant was not liable. Over the plaintiff's objection, the judge thereupon directed a verdict for the defendant. The Supreme Judicial Court held that the plaintiff had a right to a jury trial on the omitted issue of fact. See also Stone v. Orth Chevrolet Co., Inc., 284 Mass. 525, 528, 187 N.E. 910, 912 (1933).

Note that in Fitzgerald the plaintiff's objection was held to be timely, even though it was made after the judge directed a verdict for the defendant. This directly conflicts with Rule 49(a). Further, the Fitzgerald jury in fact returned a "special verdict," as the term is used in Rule 49(a). It answered the special questions submitted to it; the judge then directed a defendant's verdict. Under Rule 49(a), the judge would merely have entered judgment for the defendant; the net effect is identical. Rule 49(a), in other words, allows the jury to find the basic facts, with the judge then applying the law to those facts and entering judgment for the appropriate party.

Rule 49(b) allows the court to require the jury to return, not merely a general verdict, but also specific answers to one or more special interrogatories. In federal practice, the court has full discretion as to whether or not special questions should be submitted to the jury, Moyer v. Aetna Life Insurance Co., 126 F.2d 141, 145 (1941). If the general verdict and the answers to the interrogatories are consistent the court will enter the appropriate judgment. If the answers to the interrogatories are consistent with each other but inconsistent with the general verdict the court has three options: (1) enter judgment in accordance with the answers to interrogatories notwithstanding the general verdict; (2) return the jury for further consideration; or (3) order a new trial.

Under Federal Rule 49(b), "every reasonable intendment in favor of the general verdict should be indulged in an effort to harmonize the two. The answers override the general verdict and warrant the entry of judgment in disregard of the latter only where the conflict on a material question is beyond reconciliation on any reasonable theory consistent with the evidence and its fair inferences." Mayer v. Petzelt, 311 F.2d 601, 603n. (7th Cir.1962), quoting Theurer v. Holland Furnace Co., 124 F.2d 494, 498 (10th Cir.1941).

If the answers to interrogatories are inconsistent with each other and one or more is also inconsistent with the general verdict, the court may only (1) order the jury out for further consideration; or (2) order a new trial.

In Massachusetts, the practice of submitting special questions to the jury along with a request for a general verdict is recognized by statute, G.L. c. 231, § 124 and G.L. c. 231A, § 1. But the court's power to utilize the procedure is not statutory, Burgess v. Giovannucci, 314 Mass. 252, 256, 49 N.E.2d 907, 909 (1943), and the court has full discretion as to whether or not special questions should be submitted, Viaux v. John T. Scully Foundation, 247 Mass. 296, 301, 142 N.E. 81, 83 (1924).

The Reporters know no Massachusetts case dealing specifically with the problem of a general verdict which is inconsistent with one or more special questions. In Dorr v. Fenno, 29 Mass. 520, 525-526 (1832), a case involving jury misconduct (quotient verdict), the court indicated by way of dictum that a judge could either send the jury back for further deliberations or set the verdict aside in the event that the general verdict was inconsistent with the answers to special questions.

Rule 49(b) is inconsistent with Massachusetts practice in two respects. Rule 49(b) requires that special questions be in writing; under prior Massachusetts practice the judge could put the questions to the jury orally, Newell v. Rosenberg, 275 Mass. 455, 458, 176 N.E. 616, 617 (1931). Rule 49(b) also requires that the special questions be submitted "together with appropriate forms for a general verdict" (emphasis added); prior Massachusetts practice permitted the judge to submit questions after the jury had returned with a general verdict, Id.

Rule 50: Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

(a) Motion for Directed Verdict: When Made; Effect. A party may move for a directed verdict at the close of the evidence offered by an opponent, and may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A party may also move for a directed verdict at the close of all the evidence. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may serve a motion to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may serve a motion for judgment in accordance with the motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment.

In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment not-withstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Amended October 1, 1998, effective November 2, 1998.

Reporter's Notes (1998): Prior to amendment in 1998, the language of Rule 50(b) provided that a party may "move" for judgment notwithstanding the verdict within ten days of entry of judgment. The Appeals Court has construed this language to require service of the motion within the ten-day period, rather than filing. Russell v. Pride Convenience, Inc., 37 Mass. App. Ct. 502 (1994). Filing in court should be made within a reasonable time after service. Mass.R.Civ.P. 5(d). The Supreme Judicial Court has endorsed this interpretation. F.W. Webb Co. v. Averett, 422 Mass. 625, 629, n.5 (1996).

The 1998 amendment to Rule 50(b) adopts this interpretation by deleting the term "move" and substituting language requiring service of the motion within ten days. The change is not intended to alter existing practice. Rather, it serves to harmonize the language of Rule 50(b) with that of Rule 59, the latter requiring a motion for new trial to be "served" not later than ten days after judgment.

Reporter's Notes (1996): With the merger of the District Court rules into the Mass.R.Civ.P., Rule 50 has been made applicable to the District Court, to the extent that Massachusetts law permits trial by jury in District Court civil actions.

Reporter's Notes (1973): Rule 50(a) is patterned upon Federal Rule 50(a), with the first sentence revised for clarity. It liberalizes the Massachusetts practice governing defendant's motion for a directed verdict at the close of the plaintiff's evidence. Formerly, the judge could refuse to rule upon the defendant's motion unless the defendant rested his case upon his opponent's evidence, thereby surrendering his right to put in his own case. See Hurley v. O'Sullivan, 137 Mass. 86, 87 (1884). "The defendant was not entitled to a ruling upon plaintiff's case, reserving to himself the right to put in his own case afterwards." McMahon v. Tyng, 96 Mass. 167, 169 (1867). Under Rule 50(a), the

defendant retains just that right. The judge may still refuse to decide such motion when made, but must rule on it at a later stage of the trial.

"Plaintiff says that 50(a) itself provides no right of reservation or later determination of the motion by the court. The answer to this contention is that nowhere in 50(a) is there evidence of any intention to take from the court its power to reserve a motion at the end of plaintiff's case and later dispose of that motion. . . . [W]here the court has taken a motion under advisement under 50(a) it not only can but must decide the issue." Sattler v. Great Atlantic & Pacific Tea Co., 18 F.R.D. 271, 274 (W.D.La.1955); see also, Stevens v. G.L. Rugo & Sons Inc., 115 F.Supp. 61, 62 (D.Mass.1952), reversed on other grounds, 209 F.2d 135 (1st Cir.1953).

Until now, the only formal requirements for a motion for directed verdict were that it be in writing, (Super.Ct.R. 71), and that if the declaration contained more than one count the motion specify the particular count upon which a verdict is sought. The provision of Rule 50(a) that a motion for a directed verdict "state the specific grounds therefor," although often strongly advocated by the Supreme Judicial Court, is new to Massachusetts practice. "When a judge is not prepared to grant such a motion, a prudent practice for him to adopt is to require the moving party to state all the grounds upon which he relies in support of the motion as otherwise an exception to the denial of the motion leaves open every ground in support of the motion even though not mentioned or even thought of at the time of the trial", Trites v. City of Melrose, 318 Mass. 378, 380, 61 N.E.2d 656, 657 (1945).

The motion for judgment notwithstanding the verdict is new to Massachusetts practice. Unlike practice under former G.L. c. 231, § 120 (entry of verdict or finding in accordance with leave reserved), a motion for judgment n.o.v. does not depend upon the judge's discretionary reservation of leave to review the sufficiency of either party's case. Rule 50(b) presumes such a reservation in every case in which an unsuccessful motion for directed verdict has been made at the close of all the evidence.

The provisions of Rule 50(b) make a party's motion for directed verdict a prerequisite to his motion for judgment notwithstanding the verdict. In Massachusetts, no preliminary motion was required before a party could move that a verdict be entered in his favor under leave reserved. Interstate Busses Corp. v. McKenna, 329 Mass. 1, 2, 105 N.E.2d 852, 853 (1952).

There is no Massachusetts practice similar to the provisions of Rule 50(c) and (d). They aim at expediting judicial administration by requiring the trial judge to make "if-it-should-be-determined-I-have-erred" rulings with respect to a motion for new trial made concurrently with the motion for judgment n.o.v.

Rule 51: Argument: Instructions to Jury

(a) Time for Argument. Counsel for each party shall be allowed thirty minutes for argument; but before the argument commences, the court, on motion or sua sponte, may reasonably reduce or extend the time. When two or more attorneys are to be heard on behalf of the same party, they may divide their time as they elect.

(b) Instructions to Jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Effective July 1, 1974.

Reporter's Notes (1996): With the merger of the District Court rules into the Mass.R.Civ.P., Rule 51 in its entirety has been made applicable to the District Court, to the extent that Massachusetts law permits trial by jury in District Court civil actions.

Reporter's Notes (1973): Rule 51(a) will work no change in Massachusetts practice.

Rule 51(b) copies Federal Rule 51, and tracks prior Massachusetts practice.

Because the adoption of Rule 46 will eliminate the present formal Massachusetts requirement for exceptions, Rule 51(b) will only work a formal change in Massachusetts practice. Instead of taking an exception, an attorney under 51(b) must object to the giving or the failure to give a requested instruction before the jury retires to consider its verdict. He must also state his grounds therefor. Under former practice, failure properly to except resulted in waiver of objection, Herrick v. Waitt, 224 Mass. 415, 417, 113 N.E. 205 (1916); failure to object seasonably will have a similar effect under the new rules. Nimrod v. Sylvester, 369 F.2d 870, 872-873 (1st Cir.1966).

Rule 52: Findings by the Court

(a) Courts Other Than District Court: **Effect.** In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law

are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)(2).

(b) Courts Other Than District Court: Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.

(c) District Court: Effect. In all actions tried upon the facts without a jury, except as otherwise provided in Rule 65.3, the court shall find the facts specially and state separately its conclusions of law thereon, provided that any party submits before the beginning of any closing arguments proposed findings of fact and rulings of law. Upon request made before the beginning of any closing arguments, such party shall have the right to submit supplemental proposed findings of fact and rulings of law within three days. Each proposed finding of fact and ruling of law should be set forth concisely in a separately numbered paragraph covering one subject. Judgment shall be entered pursuant to Rule 58. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)(2).

(d) District Court: Amendment. Upon motion of a party made not later than 10 days after entry of judgment, or upon its own initiative not later than 10 days after entry of judgment, the court may amend its findings, if any, or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

Amended effective July 1, 1996; amended November 28, 2007, effective March 1, 2008.

Reporter's Notes (2008): Rule 52 has been amended to require findings of fact and rulings of law in jury-waived cases in the District Court and Boston Municipal Court, but only if a party has submitted, before the beginning of any closing arguments, proposed findings and rulings. This differs from practice in the Superior Court under Rule 52(a), which requires Superior Court judges to make findings and rulings as a matter of course in jury-waived actions, whether or not a party has submitted proposed findings and rulings.

Requiring a party to submit proposed findings and rulings as a condition to the court's making findings and rulings is justified by the volume and nature of the civil caseload in the District Court and Boston Municipal Court. The rule also provides a party with the absolute right to a three-day period in which to submit supplemental proposed findings

and rulings, as long as that party, before the beginning of any closing arguments, has filed proposed findings and rulings and has made a request to file supplemental proposed findings and rulings. The proposed findings and rulings and the request to file supplemental proposed findings and rulings may be contained in the same document.

The amendments to Rule 52(c) include a general description of the format and content of proposed findings and rulings by a provision that they be set forth concisely and in separately numbered paragraphs covering one subject for each request. In doing so, the rule intends to state a preferred, but not mandatory, format and content for proposed findings and rulings.

A judge in the District Court or Boston Municipal Court may make findings and rulings, sua sponte, even where doing so is not required by this rule.

Simultaneously with the amendments to Rule 52(c), Rule 64A, Requests for Rulings of Law in District Court, was repealed. The repeal of Rule 64A eliminates the "requests for rulings" procedure that had been in place in the District Court and Boston Municipal Court. Under that procedure, a party could obtain rulings of law from the court by filing requests for rulings of law prior to the beginning of any closing arguments. This prior procedure merely required the court to allow or deny a requested ruling of law, and did not require the court to make its own rulings of law. Under the prior procedure, there was no mechanism for a party to require findings of fact in District Court and Boston Municipal Court jury-waived actions. Under the amended language of Rule 52(c), a party now has the opportunity to require both findings of fact and rulings of law from the trial judge.

The repeal of Rule 64A also eliminates the provisions regarding "warrants" requests. These were requests that the evidence warrants a finding for the requesting party or does not warrant a finding for the opposing party.

The requirement of findings and rulings under Rule 52(c) applies to all District Court and Boston Municipal Court cases governed by the Massachusetts Rules of Civil Procedure, that is, "cases traditionally considered tort, contract, replevin, or equity actions, except small claims actions." Rule 81(a)(2). No attempt has been made in the rule or in the Reporter's Notes to list all of the types of District Court and Boston Municipal Court actions in which findings and rulings are not required. Supplementary process is one example where findings and rulings should not be required, since supplementary process is a statutory proceeding not falling within the ambit of cases that would be "traditionally considered tort, contract, replevin, or equity."

Summary process, however, presents a different example and a different result. Although under the Massachusetts Rules of Civil Procedure, findings and rulings are not required in District Court and Boston Municipal Court summary process actions (because of the language in Rule 81(a)(2)), the application of Rule 1 of the Uniform Summary Process Rules would result in a requirement of findings and rulings in District Court and Boston

Municipal Court summary process cases pursuant to the procedure set forth in Rule 52(c). Rule 1 of the Uniform Summary Process Rules adopts the Massachusetts Rules of Civil Procedure, "insofar as the latter are not inconsistent with" the Uniform Summary Process Rules. Thus, Uniform Summary Process Rule 1 would make amended Rule 52(c), with its requirement of findings and rulings in the District Court and Boston Municipal Court upon the filing of proposed findings and rulings, applicable to summary process cases in those courts. It should be noted that in summary process cases in the Superior Court and Housing Court, findings and rulings are required as a matter of course pursuant to Rule 52(a) (made applicable to summary process cases in those courts by virtue of Uniform Summary Process Rule 1).

Reporter's Notes (1996): The amendments to Rule 52 effective in 1996 add new sections (c) and (d), applicable in the District Court, and retitle the headings to Rule 52(a) and (b). New sections (c) and (d) of Rule 52 are identical to the now-repealed provisions of Dist./Mun.Cts.R.Civ.P. 52(a) and (b), respectively. The "Comments" to now-repealed Dist./Mun.Cts.R.Civ.P. 52 provided as follows:

The revision of paragraph (a) [now Mass.R.Civ.P. 52(c)] evidences the decision not to follow the MRCP procedure of requiring an automatic set of judicial findings of fact and conclusions of law in every case tried without a jury. Rather, this rule provides that the court may make detailed findings of fact and rulings of law, and is required, as has been true in the past, to make rulings of law in response to requests for rulings submitted by any of the parties to the litigation. This procedure, and the whole mechanism of appeal to the Appellate Division of which it is the foundation, is set forth in Rule 64 of these rules. [Since July 1, 1994, appeal to the Appellate Division is governed by the District/Municipal Courts Rules for Appellate Division Appeal.]

The decision to favor the present appeal mechanism over the MRCP approach in cases tried without a jury is based on several factors. Important among these is the fact that in many of the District Courts, and particularly the Boston Municipal Court, a judge will frequently hear a large number of civil cases in the course of a single day, and on successive days, and the fact that most of these cases turn on questions of fact, which in turn relate to questions of credibility. If there were a mandatory requirement that written findings and rulings be made in each case under such circumstances, this would impose a tremendous burden in those courts. Even if adequate stenographic assistance were available to these courts for this purpose (which is not the case), this would require a large expenditure of judicial time in preparing such findings where the element of credibility would be decisive, and would merely bring into play the provisions of MRCP, Rule 52, that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In short, the present appellate mechanism is well suited to current District Court jurisdiction, and is well understood by those members of the bar familiar with District Court practice.

A clause has been added in the first sentence of paragraph (b) [now Mass.R.Civ.P. 52(d)] which allows the court on its own initiative to amend its findings and judgment, so long as it acts within ten days of the entry of judgment.

Lastly, the words "if any" have been added after the word "findings" in the first sentence of paragraph (b) [now Mass.R.Civ.P. 52(d)]. This is consistent with the fact that this rule leaves it discretionary with the trial court whether findings of fact will be made.

It should be noted that although findings of fact and conclusions of law are not generally required in the District Court, section (c), by its reference to Rule 65.3 dealing with civil contempt, will require such findings and conclusions in District Court civil contempt actions.

Reporter's Notes (1973): Rule 52 is almost identical to Federal Rule 52. It omits the phrase "or with an advisory jury" in the first sentence, because such juries are unknown to Massachusetts practice, and have not been included in Rule 39. Rule 52 does constitute a departure from the Massachusetts practice articulated by the court in Matter of Loeb, 315 Mass. 191, 196, 52 N.E.2d 37, 40-41 (1943): "On the law side of the court a judge cannot be required to make any express findings of fact." See also Maglio v. Lane, 268 Mass. 135, 137, 167 N.E. 228, 229 (1929). Even though the trial judge is not required to itemize his findings of fact, he may do so voluntarily. In actions tried without a jury, although the judge was required to pass on rulings of law requested by the parties. Ashapa v. Reed, 280 Mass. 514, 182 N.E. 859 (1932), he need not, unless he wished, make findings of fact. "Findings of fact not infrequently are made in more or less detail by a trial judge and the reasons stated for the information of parties and counsel, but that is a practice of convenience." Id. at 516, 182 N.E. at 859.

In Massachusetts equity practice, on the other hand, the trial judge was obligated, if the losing party requested, to "report the material facts" upon which his decision was based. If no request was made, a report was discretionary. See also Matter of Loeb, 315 Mass. 191, 196 note, 52 N.E.2d 37, 40-41 (1943).

Under Rule 52(a), the trial court's findings of fact cannot be set aside unless the appellate court determines them to be "clearly erroneous". "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

The rule emphasizes the "opportunity of the trial court to judge the credibility of the witnesses." This is similar to prior Massachusetts equity practice.

In equity cases (where the judge made findings of fact), the full Supreme Judicial Court had to make its own evaluation of the testimony, giving due weight to the trial judge's findings. Those findings would not be reversed unless "plainly wrong." McMahon v. Monarch Life Ins. Co., 345 Mass. 261, 262, 263, 186 N.E.2d 827, 828-829 (1962);

Sulmonetti v. Hayes, 347 Mass. 390, 391, 198 N.E.2d 297, 298-299 (1964). Like Rule 52(a), Massachusetts decisions emphasize that the trial judge is "in the best position to determine the weight and credibility of the evidence," Oberg v. Burke, 345 Mass. 596, 598, 188 N.E.2d 566, 568 (1963); Murphy v. Hanlon, 322 Mass. 683, 685, 79 N.E.2d 292, 293 (1948).

In Massachusetts, the findings in a confirmed master's report were binding upon the court unless they were "mutually inconsistent or plainly wrong." Rose v. Homsey, 347 Mass. 259, 260, 197 N.E.2d 603, 605 (1964); Lukas v. Leventhal, 344 Mass. 762, 183 N.E.2d 879 (1962).

Under Rule 52(b) the court, upon motion of a party within 10 days after entry of judgment, "may amend its findings or make additional findings and may amend the judgment accordingly." Under former practice, the trial judge had discretion to allow a rehearing and to amend his findings prior to the entry of the final decree. See, e.g., Stern v. Stern, 330 Mass. 312, 316, 113 N.E.2d 55, 58 (1953); Souza v. Souza, 325 Mass. 761, 762, 90 N.E.2d 572, 573 (1950). However, "after the entry of a final decree in equity, as after the entry of a final judgment in a suit at law, the case is finally disposed of by the court, subject to such rights of appeal, if any, as the statute gives, and the court has no further power to deal with the case except upon a bill of review." White v. Gove, 183 Mass. 333, 340, 67 N.E. 359, 362 (1903).

The change engendered by Rule 52(b) stems largely from the difference between "judgment" under the Rules and the Massachusetts concept of "judgment". See Reporters' Notes to Rule 58.

Rule 53: Masters

(a) Definition. The following words, as used in this rule, shall mean:

(i) "master" shall mean any person, however designated, who is appointed by the court to hear evidence in connection with any action and report facts.

(ii) "stenographer" shall mean a stenographer appointed by the master before commencement of the hearing.

(b) Appointment.

(1) Member of Bar. The court in which an action is pending may appoint a master therein subject, however, to a standing order, if any, of the Administrative Justice designating classes of cases not to be tried to a master, and provided further that in the District Court, no master may be appointed without the assent of all parties. No master shall be appointed who is not a member in good standing of the bar of one of the United States or of the District of Columbia.

(2) Selection by Agreement. Prior to appointment of a master, the court shall inquire whether the parties can agree upon a master. The court shall appoint the person agreed upon unless

the court is of the opinion that the proposed master is unqualified, or for other good reason should not be appointed.

(3) Selection Without Agreement. If the parties cannot agree upon a master, the court whenever practicable shall select a master from such official standing list of masters, if any, as may have been approved by the department in which the action is pending. The court may select from such list a non-resident of the county in which the action is pending or a person whose office is not in said county. If the court finds that special circumstances make it advisable to select and appoint a master whose name is not on an official standing list, in making such appointment it shall forthwith file with the clerk a statement containing its specific reasons for selecting and appointing a master not on such list.

(4) Objection to Master Selected. If an objection is made by any party to the appointment of a master selected by the court, whether from the official standing list, if any, or otherwise, the objecting party shall file with the court within five (5) days of notice of such appointment a written objection to such appointment, and notice of such filing shall be forwarded forthwith by the clerk of court to the referring justice. The grounds for such objection shall not be included within such written objection but shall be furnished to the referring justice upon his request and in the form that the referring justice shall order.

(5) Inability to Serve. Upon receipt of an order of reference as herein provided, a person appointed a master shall notify the referring justice immediately if he is unable or unwilling to serve as master in the case. No person shall accept appointment as master in any case in which he cannot be impartial. If there are circumstances known to the master, which may give the appearance of partiality, including the existence of any pending matter between the master and any party to the litigation or any party's counsel, the master must make full written disclosure to the referring justice and all parties immediately after receipt of the order of reference.

(c) Compensation. The compensation allowed to a master may be charged in whole or in part upon the parties, or out of any fund or subject matter of the action which is in the custody or control of the court, or, when authorized by law, upon the Commonwealth, as the court may direct. The rate of compensation to be paid by the parties or out of any fund or subject matter of the action shall be fixed by the court; the rate of compensation to be paid by the Commonwealth shall be fixed from time to time by rule of each department. Where compensation is to be paid by the Commonwealth, no additional compensation shall be accepted from the parties, unless approved by the court and stated in the order of reference. When a party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(d) Order of Reference. A master shall be appointed by a written order of reference. Said order:

(i) shall either fix definite times for the hearings or fix the time when or before which hearings

shall be begun and the time within which they shall be ended; (ii) shall fix the time for the filing of the master's report; (iii) may specify or limit the master's powers and may direct him to report only upon particular issues or to do or perform particular acts.

(e) Powers. Subject to the specifications and limitations stated in the order of reference, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and he shall have the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath.

(f) Proceedings.

(1) Hearings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof the master shall forthwith notify the parties or their attorneys of the time, date and place of the first hearing. The order of reference may require that the hearings proceed from day to day, Saturdays, Sundays and holidays excepted, until completed. If the court does not order the master to proceed from day to day, nevertheless he shall proceed as nearly as possible on consecutive days, and shall grant no adjournment for a longer period than seven (7) days except by order of the court. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. The court may change or extend the time for hearings. Hearings shall be held at a court house, unless the parties and the master agree otherwise or, upon application by the master, the court expressly orders that hearings be held elsewhere.

(2) Evidence. Rules 43(a), (b), (d) and (g) will govern hearings before masters. If an objection to a question propounded to a witness is sustained by the master, and there is a stenographer present, upon request the master shall take the proffered evidence as an offer of proof unless the master finds that the proffered evidence is privileged.

(3) Interpreters. The master may appoint an interpreter whose compensation shall be fixed by the court. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs in the discretion of the court.

(4) Stenographers. No master shall, without prior approval of the court, appoint a stenographer to be paid by the Commonwealth.

(5) Statement of Accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a

witness. Upon objection of a party to any of the items thus submitted or upon showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(6) Failure to Appear. If all parties fail to appear at a hearing without showing good cause, the master shall report forthwith to the clerk of the court in which the action is pending, and the clerk shall bring such report forthwith to the attention of the referring justice, if practicable, otherwise to any justice of the court. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment, or apply to the court, with notice to the parties, for the imposition of sanctions.

(7) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished by the court as for a contempt.

(g) Master's Report.

(1) Contents. The master shall prepare a report upon the matters submitted to him by the order of reference, and, if required by the order of reference to make findings of fact and conclusions of law, he shall set them forth in the report. The master's report will contain the master's general finding upon each issue that is within the order of reference and will include and clearly identify the subsidiary findings upon which each general finding is based. No general findings will be presumed by the court to be supported by subsidiary findings which are not stated in the report as the basis therefor. In a jury case, the master's report shall contain findings on damages, separately stated, irrespective of his determination of liability. In a non-jury case the master need not make findings on damages if he determines that there is no liability. Any party, at the conclusion of the evidence may file with the master requests for findings of fact and conclusions of law.

(2) Filing. At least 20 days before filing his report, the master shall submit a draft thereof to counsel for all parties. Counsel for any party may submit to the master suggested amendments in writing, copies of which must be contemporaneously submitted to counsel for all of the parties. The master may, in his discretion, allow a hearing on any suggested amendments. If any suggested amendment is adopted by the master, he shall furnish counsel for all parties with copies of said amendment contemporaneously with the filing of his report. Within 60 days after the close of the evidence, unless the court, on motion or otherwise, for good cause shown, shall alter the time, the master shall file his report and the original exhibits with the clerk of the court. The clerk shall forthwith mail to all parties notice of the filing.

(h) Master's Report in Non-Jury Cases.

(1) Status of Report. In an action to be tried without a jury, the court shall accept the master's subsidiary findings of fact unless they are clearly erroneous, mutually inconsistent, unwarranted by the evidence before the master as a matter of law or are otherwise tainted by error of law. Any party who contends that the master's subsidiary findings are clearly erroneous, mutually inconsistent, unwarranted by the evidence before the master or are otherwise tainted by error of law must make such contentions by objection as hereinafter provided. The court may draw its own inferences from the master's subsidiary findings. The court may make findings in accordance with Rule 52, which are in addition to the master's findings and not inconsistent therewith, based either on evidence presented to the court or evidence before the master which was recorded by means approved by the master before commencement of the hearing.

(2) Objections to Report. Within 30 days after service of notice of the filing of the report or such other time as the court may allow, any party may serve written objections thereto upon every other party making any of the contentions referred to in paragraph (1) of this section, clearly stating the grounds for each objection and the relief sought. At any time after the filing of objections or the expiration of the time therefor, any party may move the court, with notice to all other parties, to act upon the report and upon any objections thereto, provided, however, the court may so act upon its own motion after notice to all parties.

(3) Limitations on Review. The court will not review a question of law dependent upon evidence before the master unless the evidence was recorded by a stenographer and a transcript of so much of the proceedings before the master as is necessary to dispose of the objections adequately is served, together with the objections, upon every other party. Any party may designate additional portions of the transcript for submission to the court by the service of notice within 10 days after service of the objections. The objecting party shall serve such additional portions upon every other party; but if the objecting party shall refuse to do so, the party designating such additional portions shall either serve them upon every other party or shall move the court to require the objecting party to do so. At the time of ordering a transcript from the stenographer, a party shall make satisfactory arrangements with the reporter for payment of the cost of any transcript ordered. The parties are encouraged to agree as to the portions of the transcript that will accompany the objections.

(4) Action on Report. The court may adopt the report, strike it in whole or in part, modify it, recommit it to the master with instructions or take any other action that justice requires. Any motion to adopt a report shall be deemed to include a motion to enter judgment and shall be accompanied by a proposed form of judgment.

(i) Master's Report in Jury Cases.

(1) Status of Report. In an action to be tried by a jury the master's findings upon all the issues submitted to him are admissible as prima facie evidence of the matters found and may be read

to the jury and, in the discretion of the court, may be submitted to the jury as an exhibit, subject, however, to the rulings of the court upon any objections properly preserved as hereinafter provided.

(2) Objections to Report. Within 30 days after service of notice of the filing of the report or within such further time as the court may allow any party may serve written objections thereto upon every other party objecting to the findings as mutually inconsistent, unwarranted by the evidence before the master as matter of law or otherwise tainted by error of law, clearly stating the grounds for each objection and the relief sought. Within 45 days after service of objections or such further time as the court may allow, the objecting party shall move the court to act upon the objections and within said 45 days or such further time as the court may allow said motion must be heard by the court.

(3) Limitations on Review. The court will not review a question of law dependent upon evidence before the master unless the evidence was recorded by a stenographer and a transcript of so much of the proceedings before the master as is necessary to dispose of the objections adequately is served together with the objections upon every other party. Any party may designate additional portions of the transcript for submission to the court by the service of notice within 10 days after service of the objections. The objecting party shall serve such additional portions upon every other party; but if the objecting party shall refuse to do so, the party designating such additional parts shall either serve them upon every other objecting party or shall move the court to require the objecting party to do so. At the time of ordering the transcript from the stenographer, a party shall make satisfactory arrangements with the reporter for payment of the cost of any transcript ordered. The parties are encouraged to agree as to the portions of the transcript that will accompany the objections.

(4) Action on Report. The court may strike the report in whole or in part, modify it, recommit it to the master with instructions or take any other action that justice requires.

Amended effective Feb. 24, 1975; amended May 25, 1982, effective July 1, 1982; May 3, 1996, effective July 1, 1996.

Reporter's Notes (1996): With the merger of the District Court rules into the Mass.R.Civ.P., the version of Mass.R.Civ.P. 53 as amended in 1982 is made applicable to the District Court. The specific language that had been included in now-repealed Rule 53(a) of the Dist./Mun.Cts.R.Civ.P. providing that a master may not be appointed in District Court proceedings without the assent of all parties has been retained in the merged rule for District Court civil proceedings.

Reporter's Notes (1982): Rule 53 ("Masters") consolidates into one rule many of the provisions of the former Rule 53 and former Superior Court Rule 49. There are several new provisions, however, which appeared in neither of the former Rules. For example, Rule 53(b)(1) now explicitly provides that a master must be a "member in good standing

of the bar." Rule 53(b)(5) requires the master to "make full written disclosure" of "circumstances known to the master, which may give the appearance of partiality."

The most significant new features of Rule 53 are found in Rule 53(g) ("Master's Report"), Rule 53(h) ("Master's Report in Non-Jury Cases"), and Rule 53(i) ("Master's Report in Jury Cases"). These new provisions describe what a Master's Report must contain, the timing of each step, the role of objections, and the limitations on review by the trial court. Under new Rule 53(g)(1), the master in a jury case must make findings on damages, even if the master has determined that there is no liability; these damage findings are admissible as prima facie evidence at the jury trial (Rule 53(i)(1)). Rule 53(g)(1) now expressly authorizes, but does not require, requests for findings of fact. New Rule 53(i)(1) abolishes "facts final" references in jury cases which were previously countenanced in the form for orders of reference to a master in jury actions, which was a part of Superior Court Rule 49. Such "facts final" references were eliminated as probably inconsistent with a jury trial. The new Rule substitutes "objections to report" (Rule 53(h)(2) and (i)(2)) for the multiple steps of filing objections in the nature of exceptions and then filing separate motions, such as those to strike or recommit. In jury cases, a party objecting to any aspect of the report must within 45 days after service of the objections "move the court to act upon" them, unless the court allows further time (Rule 53(i)(2)).

New Rules 53(h)(3) and 53(i)(3) now condition review of "a question of law dependent upon evidence before the master" on the existence of "a transcript of so much of the proceedings before the master as is necessary to dispose of the objections adequately." A master is no longer required to prepare a summary of the evidence, as under previous Superior Court Rules 49(7) and (8). The new process is comparable to Massachusetts Rule of Appellate Procedure 8(b)(1). In new Rules 53(h)(4) and 53(i)(4) the reviewing court is given the power, along with specifically enumerated powers, to "take any other action that justice requires" with respect to the report. The reviewing court can, when appropriate, reverse a master's ultimate finding, and enter a finding for the opposing party (compare old Rule 53(e)(2) and old Superior Court Rule 49(8)).

Turning now to each new rule consecutively, Rule 53(a) defines "master" and "stenographer." "Master" means "any person ... who is appointed by the court to hear evidence in connection with any action and report facts." As in previous Rule 53, the distinction between "auditor" and "master" is eliminated.

Rule 53(b) deals with "Appointment." Rule 53(b)(1) requires that masters be members in good standing of the bar, since masters deal with legal issues and render legal conclusions. A court, under this Rule, may appoint a master in any case except those classes of cases, "if any," designated by the Administrative Justice "not to be tried to a master." The Supreme Judicial Court has frequently commented on the potential delay and confusion resulting from references to masters, and cautioned that the judicial

discretion to refer cases "should be exercised most discriminately and reasonably sparingly." O'Brien v. Dwight, 363 Mass. 256, 280, 294 N.E.2d 363, 378 (1973). Also see, for examples, Peter v. Wallach, 366 Mass. 622, 626, 321 N.E.2d 806, 808 (1975), and Jet Spray Cooler, Inc. v. Crampton, 377 Mass. 159, 163, 385 N.E.2d 1349, 1352, 1353 (1979). It is important, therefore, that the Administrative Justice has the power to designate entire classes of cases "not to be tried to a master."

Rule 53(b)(2), "Selection by Agreement," requires the court to "inquire whether the parties can agree upon a master," prior to appointment. Unless the court "is of the opinion that the proposed master is unqualified, or for other good reason should not be appointed," the court "shall appoint the person agreed upon." This is similar to previous Superior Court Rule 49(1)(b).

Rules 53(b)(2) through 53(b)(5) dictate how a master is to be appointed when the parties cannot agree; how and when a party may object to "the appointment of a master selected by the Court;" and the responsibility of a newly appointed master to give notice "if he is unable or unwilling to serve." Rule 53(b)(5) also requires a person to decline appointment as master "in any case in which he cannot be impartial," and to make full written disclosure "if there are circumstances known to the master, which may give the appearance of partiality."

Rule 53(c) contains "Compensation" provisions, and tracks much of the previous Rule 53(a) compensation language, except, in keeping with the results of Court Reorganization, references to the "county" and "rule of the justices of the court" have been replaced by "the Commonwealth" and "rule of each department."

Rules 53(d) ("Order of Reference") and 53(e) ("Powers") contain much of what was previously found in Rule 53(c). Provisions with respect to evidence and objections, which were previously covered in Rule 53(c), are now governed by a new Rule 53(f)(2).

Rule 53(f), entitled "Proceedings," has seven sections. Rule 53(f)(1), "Hearings," provides for the timing and location of hearings. Rule 53(f)(2), "Evidence," provides that Rules 43(a), (b), (d) and (g), which also deal with evidence issues, "will govern hearings before masters." Rule 53(f)(3) covers "Interpreters," and Rule 53(f)(4), "Stenographers." Rule 53(f)(5), "Statement of Accounts," is identical to previous Rule 53(d)(3). Rule 53(f)(6), "Failure to Appear," provides more specific options than previous Rule 53(d)(1) about the consequences of a party's failure to appear. Under the new rule, if a party fails to appear, the master may proceed ex parte, or adjourn the proceedings, or apply to the court for the imposition of sanctions. Rule 53(f)(7), "Witnesses," permits "subpoenas as provided in Rule 45," and also provides for the possible imposition of a punishment by the court "as for a contempt" in the event a witness fails to appear "without adequate excuse." This "Witnesses" section, unlike previous Rule 53(d)(2), no longer includes "consequences, penalties, and remedies provided in Rules 37 and 45" for failure to honor a subpoena.

Rule 53(g), Rule 53(h), and Rule 53(i) contain the provisions relating to Master's Reports. Rule 53(g) is a general rule, with separate sections on “Contents” and “Filing.” Rule 53(h) provides specific rules with respect to a “Master's Report in Non-Jury Cases,” and Rule 53(i) does the same for a “Master's Report in Jury Cases.” Rule 53(g), (h), and (i), taken together, cover questions previously dealt with in Rule 53(e) and Superior Court Rule 49(7) and (8).

Rule 53(g)(1) requires the master's report to “contain the master's general finding upon each issue that is within the order of reference” and to “include and clearly identify the subsidiary findings upon which each general finding is based.” In jury cases the master must make “findings on damages, separately stated,” but “in a non-jury case the master need not make findings on damages if he determines that there is no liability.” Parties may file requests for findings “at the conclusion of the evidence.”

Rule 53(g)(2) obligates the master to submit a draft report “at least 20 days before filing his report.” Previous Rule 53(e)(5), on draft reports, did not have this specific time period. The master's report must be filed “within 60 days after the close of the evidence,” unless the court alters the time. This changes the 45 day period under previous Rule 53(e)(1). Counsel may submit suggested amendments in writing to the draft report, and the “master may, in his discretion, allow a hearing on any suggested amendments.”

Rule 53(h), “Master's Report in Non-Jury Cases,” and Rule 53(i), “Master's Report in Jury Cases,” are each divided up into four sections: “(1) Status of Report,” “(2) Objections to Report,” “(3) Limitations of Review,” and “(4) Action on Report.” Rule 53(i) abolishes “facts final” references.

In a non-jury case, “the court shall accept the master's subsidiary findings of fact unless they are clearly erroneous, mutually inconsistent, unwarranted by the evidence before the master as a matter of law or are otherwise tainted by error of law” (Rule 53(h)(1)). In a jury case, “the master's findings upon all the issues submitted to him are admissible as prima facie evidence of the matters found ..., subject, however, to the rulings of the court upon any objections properly preserved ...” (Rule 53(i)(1)).

Challenges to the master's report in a non-jury or jury action are made by the filing of objections “clearly stating the grounds for each objection and the relief sought,” (Rule 53(h)(2) and Rule 53(i)(2)). Thereafter, in a non-jury case, either party may at any time move the court to act upon the report and the objections (Rule 53(h)(2)). In a jury case, within forty-five days after service of the objections, unless the court allows further time, the objecting party “shall move the court to act upon the objections” (Rule 53(i)(2)). Unlike previous practice, counsel no longer file objections in the nature of exceptions, nor file separate motions to strike and to recommit.

In a non-jury or jury case the court will review a question of law dependent upon evidence before the master if the evidence was recorded by a stenographer and if “a

transcript of so much of the proceedings before the master as is necessary to dispose of the objections adequately is served, together with the objections, upon every other party" (Rule 53(h)(3) and Rule 53(i)(3)). The procedure for designating portions of the transcript for submission to the court is similar to that contained in Massachusetts Rule of Appellate Procedure 8(b). Under new Rule 53, counsel no longer request the master to summarize relevant evidence, as was the case under Superior Court Rule 49(7) and (8). The court will have transcripts to review rather than masters' summaries.

Rule 53(h)(4) and Rule 53(i)(4) describe the action which a court may take on the master's report in non-jury and jury cases respectively. In both jury and non-jury cases, the court may strike all or part of the report, modify it, recommit it with instructions, or take other action that justice requires. In non-jury cases the court may also "adopt the report."

Reporter's Notes (1975): As originally promulgated, Rule 53(e)(1) required the master to file his report and the original exhibits within 30 days after the hearing had been "closed". This presented an ambiguity, because a hearing in which the evidence has been completed, but the parties had not yet filed briefs, could fairly be said not yet to have been "closed." Accordingly, the rule has been amended to indicate that the master's filing deadline dates from the close of the evidence, i.e., the final resting of the parties. To allow for the filing of briefs, if desired, the master's time to report has been enlarged from 30 days to 45 days.

Reporter's Notes (1973): Rule 53, taken largely from Federal Rule 53, covers all quasi-judicial court-appointed fact-finders, including masters, referees, auditors, examiners, commissioners, and assessors.

Under prior Massachusetts practice a master could sit only in equity; an auditor could sit only in actions at law. Under the Rules, the distinction between an auditor and a master disappear. See Rule 2. The change in nomenclature should make little difference.

Under Rule 53(a) the amount and source of a master's compensation will continue to be court-regulated, either ad hoc, or by a standing order.

If a party fails to pay the master, after the court directs him to, the master has only those rights of an ordinary judgment creditor. He may not withhold his report; the rule does not recognize a master's lien.

Reference may be made when the parties agree to it. Rule 53(b). This provision, which is not a part of Federal Rule 53, honors existing Massachusetts practice.

Under Rule 53(c), as under prior practice, Spiegel v. Beacon Participations, 297 Mass. 398, 406, 8 N.E.2d 895, 902 (1937), the order of reference may impose binding limitations upon the master. Subject to these restrictions, he can regulate all proceedings in hearings before him, including requiring the production before him of evidence, ruling on the admissibility of evidence, putting witnesses and/or parties on oath and examining

them. Rule 53(c) requires the master, upon request, to make a record of the evidence offered and excluded. This follows prior law. Whenever an auditor made a ruling as to the admissibility of evidence, and objection was taken thereto, the auditor if requested so to do, had to make a statement of such ruling in his report. G.L. c. 221, § 56.

Rule 53(d) requires the master, unless otherwise instructed by the order of reference, to set a time and place for the first meeting of the parties or their attorneys; this first meeting must be held within 20 days after the date of the order of reference. Rule 53(d), like prior Massachusetts practice, stresses the importance of the master's diligence. Rule 53(d)(1) permits either party, after notice to the parties and master, to apply to the court for an order to speed the proceedings. If a party fails to appear at the hearing, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day giving notice to the absent party of the adjournment. Under prior law judgment could be entered for the adverse party upon the recommendation of the auditor, G.L. c. 221, § 58; or he could proceed ex parte, Super.Ct. Rule 87. A master, faced with a similar situation, could proceed ex parte, Id. Under S.J.C. Rule 2:32, Super.Ct. Rule 87 and Prob.Ct. Rule 21, not only could the officer proceed ex parte in the absence of a party, but he had to do so "on motion of the party appearing." Rule 53 thus ameliorates the rigor of prior Massachusetts practice. It gives the master a discretionary choice. He may proceed ex parte or adjourn the proceedings to a future day.

Under Rule 53(d)(2), the parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas. An unexcused failure to appear is punishable as contempt of court, thus subjecting the absent witness to the penalties and remedies in Rules 37 and 45. This does not significantly alter prior practice. Note that the court, not the master, finds the contempt and imposes appropriate sanctions.

Under Rule 53(d)(3) the form of accounts is a matter for the master's discretion. This appears consistent with prior Massachusetts practice, which set no form for the auditor's or master's report. See Zuckernik v. Jordan Marsh Co., 290 Mass. 151, 194 N.E. 892 (1935).

Rule 53(e) requires that the master report upon the matters submitted to him by the order of reference and also report any findings of fact and conclusions of law he was required to make.

Massachusetts courts have permitted an auditor at his discretion to set forth the subsidiary facts which he found, as well as the inferences and conclusions which he drew, Fair v. Manhattan Ins. Co., 112 Mass. 320, 329 (1893). Masters had to make and report all findings of facts material to issues raised by the pleadings including not only the master's conclusions but enough subsidiary findings to enable the court to follow the steps taken by the master. Smith v. Lloyd, 224 Mass. 173, 174, 112 N.E. 615, 616 (1961). Rule 53(e)(1) preserves this practice.

Under Rule 53, as before, the master files his report with the clerk of court, who notifies the parties forthwith. Super.Ct.Rule 87 required that the master's report be filed within 30 days after the hearing had been closed. This provision has been incorporated into Rule 53(e)(1).

Rule 53(e)(2) has been amended to retain the Superior Court requirement, Super.Ct.Rule 90, that objections to a master's report clearly state the grounds. It applies the "clearly erroneous" standard to a master's findings in a nonjury case. This follows prior Massachusetts practice, where the master's findings of basic fact would stand "unless plainly wrong, mutually inconsistent or contradictory or vitiated in view of controlling principles of law." Sturtevant v. Ford, 280 Mass. 303, 308, 182 N.E. 560, 562 (1932).

Under Rule 53(e)(2), parties have a 10-day period in which to object to any findings of the master in an action seeking equitable relief or any action in which the master's findings are to be final. The court, as in existing Massachusetts practice, may accept, reject or recommit a master's report. C.A. Briggs Co. v. National Wafer Co., 215 Mass. 100, 108, 102 N.E. 87, 90 (1913).

Rule 53(e)(3) closely follows Federal Rule 53(e)(3). The language has been modified to make clear that a master's report will have "prima facie" effect if introduced at the trial. G.L. c. 221, § 56; Cook v. Farm Service Stores, Inc., 301 Mass. 564, 17 N.E.2d 890 (1938).

Rule 53(e)(4) precludes further litigation of facts in cases where the parties have stipulated that the master's findings of fact will be final.

Under Rule 53(e)(5), a master must submit a draft of his report to counsel for all parties for the purpose of receiving their suggestions. This embodies existing Massachusetts practice, Super.Ct.Rules 87, 88, 89, 90.

Rule 54: Judgments: Costs

(a) Definition; Form. The terms "judgment" and "final judgment" include a decree and mean the act of the trial court finally adjudicating the rights of the parties affected by the judgment, including:

(1) judgments entered under Rule 50(b) and Rule 52(a) and (b);

(2) judgments entered under Rule 58 upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, or upon a special verdict under Rule 49(a) or a general verdict accompanied by answers to interrogatories under Rule 49(b).

A judgment shall not contain a recital of pleadings, the report of a master or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs. Except when express provision therefor is made either in a statute of the Commonwealth or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the Commonwealth, its officers, and agencies shall be imposed only to the extent permitted by law. Except for those costs which are subject to the discretion of the court, costs shall be taxed by the clerk according to law.

Costs which are subject to the discretion of the court may be taxed by the court upon 5 days' notice. Costs which are taxable by the clerk may be taxed without notice unless a party notifies the clerk at any time after judgment and before execution that he desires to be present at the taxation of costs. Such notification shall be in writing and entered on the docket. If such notification is given, the clerk shall set a time for the taxation of costs, and shall give notice to all interested parties. The clerk shall include in the costs taxed only such items as are shown by the record and files at the time of taxation. On motion served within 5 days after receipt of notice of taxation of costs by the clerk, the action of the clerk may be reviewed by the court.

A party claiming costs shall file such certificates, affidavits and vouchers pertaining to items of costs, as he desires to have considered in taxing costs. Copies of such certificates, affidavits and vouchers shall be served by said party upon all other parties at least 5 days prior to the taxation of costs.

Whenever costs are awarded to two adverse parties in the same case, the court may order one sum to be set off against the other. If such set-off is not ordered, each party may have execution for the costs due him.

(e) Costs on Depositions. The taxation of costs in the taking of depositions, including audio-visual depositions, shall be subject to the discretion of the court, but in no event shall costs be allowed unless the court finds that the taking of the deposition was reasonably necessary, whether or not the deposition was actually used at the trail. Taxable costs may include the cost of service of subpoena upon the deponent, the reasonable fees of the officer before whom the deposition is taken, the fees and mileage allowances of the witnesses, the stenographer's reasonable fee for attendance, and the cost of the transcript of the testimony or such part thereof as the court may fix. When an audio-visual deposition is taken, taxable costs may include a reasonable fee for the use of the audio-visual equipment and for the services of the operator both in recording the deposition and editing it.

(f) Interest. Every judgment for the payment of money shall bear interest up to the date of payment of said judgment. Interest accrued up to the date of entry of a judgment shall be computed by the clerk according to law. Unless otherwise ordered by the court, interest from the date of entry of a judgment to the date of execution or order directing the payment of said judgment shall also be computed by the clerk, and the amount of such interest shall be stated on the execution or order.

Amended April 18, 1980, effective July 1, 1980; December 16, 1980, effective January 1, 1981.

Reporter's Notes (1996): With the merger of the District Court rules into the Mass.R.Civ.P., minor differences which had existed between Mass.R.Civ.P. 54 and Dist./Mun.Cts.R.Civ.P. 54 have been eliminated. These differences were based on the lack of civil jury trials in the District Court. Although there are still no civil jury trials in the District Court (with some exceptions), the differences are not significant enough to merit any changes in the merged set of civil rules.

Reporter's Notes (1986): Under Rule 54(f), the initial entry of judgment by the trial court should be the sum of the verdict and interest on that verdict to the time of said entry. Post-judgment interest should be computed on that total. See, e.g., Boston Edison v. Tritsch, 370 Mass. 260, 266 (1976); Charles D. Bonanno Linen Service, Inc. v. McCarthy, 550 F.Supp. 231, 248 (D.Mass.1982).

Reporter's Notes (1973): Rule 54(a) crystallizes the meaning of "judgment" (and "final judgment"), and emphasizes the difference between these terms and the concept of "judgment" under pre-existing Massachusetts practice. Heretofore, "judgment" has meant the last step in the case, which cuts off all appellate review (unless the losing party can successfully press a petition to vacate the judgment). Under the Rules, "judgment" is merely the final adjudicating act of the trial court, and starts the timetable for appellate review. Briefly stated, a case which "went to judgment" under the old practice was, except in the rarest circumstances, forensically dead; henceforth, a case in which judgment is "entered" is ready for appeal. See Rule 58 and Appellate Rules 3 and 4. For a definition of "appeal" see Appellate Rule 1.

Because the Rules merge "law" and "equity," see Rule 2, the word "judgment" also incorporates what used to be called a "decree".

Practice under Federal Rule 54(b) (identical to Rule 54(b)) is to wait until all claims are ripe for judgment before entering judgment on any of them. However, the court may "direct entry of a final judgment as to one or more but fewer than all of the claims or parties," although "only upon an express determination that there is no just reason for delay." This exception is necessary to avoid the injustice that may result from reserving judgment until final adjudication of all of several remotely-related claims.

Rule 54(c) requires that a judgment by default extend only to what is prayed for in the demand for judgment; otherwise, a judgment should grant the relief to which the prevailing party is entitled.

Rule 54(c) also provides that every final judgment (except a default judgment) shall grant the relief to which the party is entitled, regardless of whether he requested it or not. Thus a party may be granted equitable relief when he asked for damages, or damages when he requested equitable relief. A party may be awarded greater damages than the ad damnum.

Rule 54(d) accords with G.L. c. 261, § 1: "In civil actions the prevailing party shall recover his costs, except as otherwise provided." Costs fixed by statute are of course taxed in accordance therewith. Costs in actions whose costs are not thus regulated may not be taxed more broadly than in regulated actions. See G.L. c. 261, § 13. In the latter event, however, both rules and statute vest the court with discretion as to whether costs shall be taxed at all.

Massachusetts practice with respect to taxation of costs can be found in G.L. c. 261, § 19. The clerk may tax the costs without notifying any party, unless the adverse party has given "seasonable notice in writing to the clerk of his desire to be present at the taxation or causes such notice to be entered on the docket." This procedure will continue under Rule 54(d).

Rule 54(e) deals with the taxation of costs incident to depositions. These costs are entirely subject to the court's discretion. But costs may never be allowed unless the court finds the taking of the deposition to have been reasonably necessary. Items includible as "taxable costs" are also listed in Rule 54(e). Rule 54(e) is for all practical purposes identical to S.J.C.Rule 3:15, Section 9. The only difference is that Rule 54(e) permits taxation of witnesses' fees and mileage allowances.

Rule 55: Default

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due and affidavit that the defendant is not an infant or incompetent person or an incapacitated person as defined in G.L. c.190B, shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person or an incapacitated person as defined in G.L. c.190B unless represented in the action by a guardian, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 7 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by statute.

(3) The provisions of subparagraph (b)(2) supplement, but do not supersede, any other requirements of notice established by law.

(4) Affidavit Required. Notwithstanding the foregoing, no judgment by default shall be entered until the filing of an affidavit made by any competent person, on the affiant's own knowledge, setting forth facts showing that the defendant is not a person in military service as defined in the "Servicemembers Civil Relief Act," as set forth in 50 U.S.C. App. 501 et seq., except upon order of the court in accordance with the Act.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

Amended effective July 1, 1996; amended November 28, 2007, effective March 1, 2008; amended June 24, 2009, effective July 1, 2009.

Reporter's Notes (2009): The 2009 amendments reflect changes resulting from the adoption of the Massachusetts Uniform Probate Code.

Reporter's Notes (2008): Prior to the 2008 amendments, there were different provisions regarding default for the Superior Court and District Court. In the Superior Court, the pre-2008 version of this rule authorized the clerk to enter a judgment by default in "sum certain" cases if the defendant had been defaulted for failure to appear; otherwise, the matter had to be presented to the court (Rule 55(b)(1) and (2)). In the District Court, the pre-2008 version of this rule authorized the clerk to enter a judgment by default in "sum certain" cases, regardless of whether the default had been based on defendant's failure to appear (Rule 55(b)(3) and (4)). See Reporter's Notes to the 1996 amendments to the Mass. R. Civ. P. (merging the District Court Rules into the Mass. R. Civ. P.).
The 2008 amendments to Rule 55 serve to eliminate the differing default provisions for the Superior Court and the District Court. The amended language adopts for the District Court the Superior Court version of Rule 55. Accordingly, Rule 55(b)(3) and (4), which had contained the District Court version, have been deleted. Also, Rule 55(b)(5) and (6) have been renumbered as Rule 55(b)(3) and (4).

In light of the above, the titles to subparagraphs (1) and (2) of Rule 55(b) have been changed to read "(1) By the Clerk" and "(2) By the Court." In addition, the text of the pre-2008 version of subparagraph (5)--now renumbered as subparagraph (3)--has been amended to delete the reference to (b)(4).

Unrelated to the statewide one-trial system, the reference in renumbered Rule 55(b)(4) to the "Soldiers' and Sailors' Civil Relief Act" of 1940 has been deleted and replaced with the "Servicemembers Civil Relief Act." Congress renamed the Act and updated the Act in 2003.

Reporter's Notes (1996): The 1996 amendments to Rule 55 changes the numbering of prior subparagraphs (b)(3) and (b)(4) to (b)(5) and (b)(6), respectively, in order to accommodate new subparagraphs (b)(3) and (b)(4). New subparagraphs (b)(3) and (b)(4) are drawn verbatim from now-repealed Rule 55 of the Dist./Mun.Cts.R.Civ.P., thus retaining the original District Court version of Rule 55. Changes in the title to subparagraphs (b)(1) and (b)(2) have been added to make clear that these two subparagraphs do not apply in the District Court. New subparagraph (b)(5) corresponds to what had been (b)(3), with minor changes, while new subparagraph (b)(6) is identical to what had been subparagraph (b)(4).

The following "Comments" to Rule 55, as originally adopted in the District Court in 1975 (and as later amended), explain the differences between default procedure in the District Court and in courts governed by the Mass.R.Civ.P.:

This rule represents a significant departure from the MRCP version. Changes were made primarily because of the high default rate in District Courts in contract actions where the claim is "for a sum certain or for a sum which can by computation be made certain."

Under this rule, the question of whether the clerk or the court enters the default judgment no longer depends on whether the defendant has appeared. Rather, if the claim is for a sum certain, the clerk enters judgment according to (b)(1), and if it is not for a sum certain, the court enters judgment according to (b)(2).

In summary, the merger of the District Court rules into the Mass.R.Civ.P. has effected no change in the procedures by which default judgments are entered in the respective courts involved.

Reporter's Notes (1973): Rule 55 embraces two separate and distinct procedures:

(1) The entry of default, and (2) the entry of judgment by default. Rule 55(a) deals solely with entry of default, a formal, ministerial act of the clerk which does not constitute a judgment. Rule 55(b) provides the procedure for entering judgment by default which, in most cases, binds the defendant to the same degree as if he had appeared in the action and contested the allegations of the complaint. Riehle v. Margolies, 279 U.S. 218, 225, 49 S.Ct. 310, 313, 73 L.Ed. 669 (1928).

The entry of default by the clerk under Rule 55(a) is specifically limited to situations (1) where affirmative relief is sought; and (2) where there has been a failure to plead or otherwise to defend on the part of the opposing party. The clerk is authorized to make the entry when the above factors are brought to his attention by affidavit or otherwise.

Rule 55(a) authorizes the entry of default when the opposing party has "failed to plead or otherwise defend". The language includes a defendant's complete failure to file any papers at all, as well as his failure, after filing an appearance, to file an answer.

Rule 55(b)(1) changes slightly the language of Federal Rule 55(b)(1) by requiring the party seeking the default judgment to file an affidavit that the defendant is not an infant or incompetent. This amendment relieves the clerk of responsibility for determining the status of the defendant.

The filing of an appearance does not prevent the entry of default for failure to plead or otherwise defend, but it does, under Rule 55(b)(2), entitle a party to at least 7 days written notice of the application to the court for judgment on the default.

Rule 55(a) will produce no substantial change in Massachusetts practice. Generally, the Massachusetts rules of court and G.L. c. 231, § 57 authorized the clerk to enter a default for failure of a defendant to appear and answer. The plaintiff, however, was not required specially to request a default; if the return of service was in order, the clerk would automatically enter one.

In the federal system, a party who without answering attacks service or moves to dismiss is not liable to default for failure to appear. Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir.1949). However, he is not usually held to have submitted himself to jurisdiction. This

interpretation of Rule 55(a) may well change Massachusetts practice. See Dist.Ct.Rule 13.

Rule 55(b)(1) authorizes the clerk to enter a default judgment in certain limited circumstances. He shall do so upon plaintiff's request if:

(1) the claim against the defendant is for a sum certain or for a sum which by computation can be made certain; and

(2) the default has been entered for failure to appear; and

(3) the defendant is not an infant or incompetent.

The absence of any one of the above factors precludes the clerk from entering the judgment and presents a Rule 55(b)(2) situation.

Under Rule 55(b)(1) the plaintiff must request the clerk to enter the judgment by default and submit affidavits establishing the amount due and stating that the defendant is not an infant or an adjudged incompetent person. The section is also affected by the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.App. § 520, which is discussed below.

Rule 55(b)(2) empowers the court to enter judgment by default in cases not covered by Rule 55(b)(1). Judgment by default entered by the court must be preceded by an application from the party entitled to judgment. Denial of the motion for default judgment is interlocutory and is not an appealable order. McNutt, Jr. v. Cordox Corporation, 329 F.2d 107 (6th Cir.1964). Relief from such an order lies under Rule 55(c) or Rule 60(b).

Where the party in default is an infant or incompetent the court may enter judgment only if the infant or incompetent is represented, as provided in Rule 55(b)(2), and the representative has appeared in the action. If the party has no representative or if the representative has not appeared, a default judgment may not be entered. The power to enter judgment by default under Rule 55(b)(1) or (2) is limited by the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. § 520, which applies to state litigation as well as federal. Before a judgment based on a default of appearance is entered the plaintiff is required to file an affidavit satisfying the provisions of Rule 55(b)(4).

If the defaulting party has not appeared in the action, he is not entitled to notice of the plaintiff's pending application for judgment. Bowles v. Branick, 66 F.Supp. 557 (W.D.Mo.1946). If the defaulting party has filed an appearance, the defaulted party must be served with written notice of the application for judgment at least 7 days prior to the hearing on such application. Federal Rule 55(b)(2) specifies a three-day notice period; the time has been extended to conform with the notice period for motions prescribed in Rule 6. Failure to serve the required notice is considered a serious procedural irregularity warranting reversal by an appellate court, Hoffman v. New Jersey Federation of Young Men's and Young Women's Hebrew Assn's, 196 F.2d 204 (3d Cir.1939), or setting aside the trial court's judgment, Meeker v. Rizley, 324 F.2d 269 (10th Cir.1963). It has been

held, however, that failure to give written notice may not prevent the entry of judgment if the defendant has actual notice of the pending application. I.C.C. v. Smith, 82 F.Supp. 39 (E.D.Pa.1949).

The purpose of Rule 55(b)(3) is to make it clear that the notice provisions of subparagraph (b)(2) supplement rather than supersede other notice requirements established by law. Thus, for example, Rule 55(b)(2) will have no effect upon G.L. c. 231, § 58A which provides that if a defendant is defaulted for failure to appear in a tort action wherein payment of the judgment is secured by a motor vehicle liability policy or bond, damages shall not be assessed until the expiration of four days after the plaintiff has given notice of such default to the issuing company and has filed an affidavit to that effect.

No hearing is provided if judgment is entered by the clerk. Where the court is required to enter the judgment, Rule 55 provides for a hearing. The hearing is not a trial; if the court determines that the defendant is in default, his liability is established and may not be contested. The defaulted party is, however, provided an opportunity to contest the amount of damages; the court may hold such hearings as it deems necessary including an accounting or reference to a master. In addition, a jury trial may be proper where provided by statute. Rule 55 is subject to the provisions of Rule 54(c) that a judgment by default may not be different in kind or exceed in amount that prayed for in the complaint. Neither Rule 54(c) nor Rule 55 should be interpreted to require the court to grant any relief at all. Thus if a complaint on its face seeks improper relief, e.g. an injunction against speech which is clearly constitutionally protected, the court need grant no relief at all, even though the defendant has been defaulted.

Rule 55(b) does not substantially change Massachusetts practice. It merely distinguishes those situations where the clerk may enter judgment by default from those where court action is required.

Rule 55(c) allows the court to set aside the entry of default for “good cause”; and may, for any of the grounds set forth in Rule 60(b), set aside a judgment by default. Because the entry of default is an interlocutory order, a motion under 55(c) is addressed to the sound judicial discretion of the trial judge and will not be reversed except for abuse of that discretion. Although an adequate basis for the motion must be shown, any doubt should be resolved in favor of setting aside defaults so that cases may be decided on their merits. Alopari v. O'Leary, 154 F.Supp. 78 (E.D.Pa.1957).

Rule 55(c) is similar to prior Massachusetts practice. G.L. c. 231, § 57 specifically provides that at any time before judgment a default may be set aside for good cause shown. The grounds for relief from a judgment in Massachusetts are substantially similar to those recognized in the federal system.

Rule 55(d) makes clear that the party entitled to a judgment by default may be a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim.

Rule 56: Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest

upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Amended March 7, 2002, effective May 1, 2002.

Reporter's Notes to Rule 56(C) (2002): The 2002 amendment to Rule 56(c) deletes the phrase "on file" from the third sentence, in recognition of the fact that discovery documents are generally no longer separately filed with the court. See Rule 5(d)(2) and Superior Court Administrative Directive No. 90-2. The previous reference to admissions has also been replaced by a reference to "responses to requests for admission under Rule 36." The amendment is merely of the housekeeping variety and no change in practice is intended.

Reporter's Notes (1973): Except in a narrow class of cases, Massachusetts has up to now lacked any procedural device for terminating litigation in the interim between close of pleadings and trial. Under G.L. c. 231, §§ 59 and 59B, only certain contract actions could be disposed of prior to trial. In all other types of litigation, no matter how little factual dispute involved, resolution had to await trial.

Rule 56, which, with a small addition, tracks Federal Rule 56 exactly, responds to the need which the statutes left unanswered. It proceeds on the principle that trials are necessary only to resolve issues of fact; if at any time the court is made aware of the total absence of such issues, it should on motion promptly adjudicate the legal questions which remain, and thus terminate the case.

The statutes, so far as they went, embodied this philosophy. They aimed "to avoid delay and expense of trials in cases where there is no genuine issue of fact." Albre Marble & Tile Co., Inc. v. John Bowen Co., Inc., 338 Mass. 394, 397, 155 N.E.2d 437, 439 (1959). Rule 56 will extend this principle beyond contract cases. Thus in tort actions where the facts are not disputed, summary judgment for one party will be appropriate. Should the

facts concerning liability be undisputed, but damages controverted, Rule 56(c) authorizes partial summary judgment: the court may determine the liability issue, leaving for trial only the question of damages.

The important thing to realize about summary judgment under Rule 56 is that it can be granted if and only if there is "no genuine issue as to any material fact." If any such issue appears, summary judgment must be denied. So-called "trial by affidavits" has no place under Rule 56. Affidavits (or pleadings, depositions, answers to interrogatories, or admissions) are merely devices for demonstrating the absence of any genuine issue of material fact. Introduction of material controverting the moving party's assertions of fact raises such an issue and precludes summary judgment.

On the other hand, because Rule 56 recognizes only "genuine" material issues of fact, Rule 56(e) requires the opponent of any summary judgment motion to do something more than simply deny the proponent's allegations. Faced with a summary judgment motion supported by affidavits or the like, an opponent may not rely solely upon the allegations of his pleadings. He bears the burden of introducing enough countervailing data to demonstrate the existence of a genuine material factual issue.

If, however, the opponent is convinced that even on the movant's undisputed affidavits, the court should not grant summary judgment, he may decline to introduce his own materials and may instead fight the motion on entirely legal (as opposed to factual) grounds. Indeed, the final sentence of Rule 56(c) makes clear that in appropriate cases, summary judgment may be entered against the moving party. This is eminently logical. Because by definition the moving party is always asserting that the case contains no factual issues, the court should have the power, no matter who initiates the motion, to award judgment to the party legally entitled to prevail on the undisputed facts.

Rule 57: Declaratory Judgment

The procedure for obtaining a declaratory judgment pursuant to General Laws c. 231A shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Effective July 1, 1974.

Reporter's Notes (1996): With the merger of the District Court rules into the Mass.R.Civ.P., minor differences which had existed between Mass.R.Civ.P. 57 and Dist./Mun.Cts.R.Civ.P. 57 have been eliminated.

Reporter's Notes (1973): G.L. c. 231A is the Uniform Declaratory Judgment Act with minor changes and additions. Rule 57, specifically referring to the statute, does not effect any essential change in Massachusetts practice. The main thrust of Rule 57 is that actions for declaratory judgment are to be brought in accordance with the Rules. Although the statute is quite detailed procedurally (see, e.g., G.L. c. 231A, §§ 7 and 8 dealing respectively with costs and necessary parties), the specificity of the Act should cause no conflict with the Rules.

The abolition, by Rule 2, of the distinction between law and equity requires only verbal adjustment of prior practice. The rule (S.J.C. Rule 2:23) prohibiting the plaintiff's attorney in a declaratory judgment proceeding from representing the defendant remains unchanged.

The last sentence of Rule 57 specifically authorizes priority trial treatment for declaratory judgment actions. It does not materially alter the assignment judge's power (see Super.Ct. Rules 59 and 63); and it makes clear to bench and bar that declaratory judgment proceedings, which by their nature frequently require summary disposition, may receive whatever special treatment they need.

Rule 58: Entry of Judgment

(a) After Trial or Hearing or by Agreement. Subject to the provisions of Rules 54(b)and 23(c): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, or upon a written agreement for judgment for a sum certain or denying relief, the clerk, unless the court otherwise orders, shall forthwith prepare, sign and enter judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict under Rule 49(a) or a general verdict accompanied by answers to interrogatories under Rule 49(b), the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document; but when any party files an agreement for judgment, or a notice or stipulation of dismissal pursuant to Rule 41(a)(1), the agreement, notice, or stipulation, as the case may be, shall, upon being filed, constitute the judgment, for all purposes, and no separate document need be prepared. A judgment is effective only when so set forth or filed and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall submit forms of judgment upon direction of the court. The court, on motion, may allow a hearing on the form of the judgment.

(b) Upon Order of Supreme Judicial Court. The clerk shall enter any judgment specifically directed by the Supreme Judicial Court.

Amended December 14, 1976, effective January 1, 1977.

Reporter's Notes (1996): With the merger of the District Court rules into the Mass.R.Civ.P., minor differences which had existed between Mass.R.Civ.P. 58 and Dist./Mun.Cts.R.Civ.P. 58 have been eliminated.

Reporter's Notes (1973): Rule 58 tracks Federal Rule 58 and works a substantial change in Massachusetts practice.

The rule deals with the ministerial act of "entry" of judgment as opposed to the judicial act of "rendition" of judgment. Its aim is to ascertain the exact date when a judgment becomes effective. That date is important because it begins the allowable period for making most of the post-verdict motions included in the Rules, and (in some cases) for taking an appeal.

The provisions of the rule are subject to Rule 54(b) and Rule 23(c). Rule 54 operates as to the entry of final judgment on any issue or as to any party in a suit which involves multiple claims or multiple parties. Under Rule 54(b) the court may direct the entry of final judgment as to one or more but fewer than all of the claims, provided the court makes "an express determination that there is no just reason for delay" and "makes an express direction for the entry of judgment." Rule 23(c) prohibits dismissal or compromise of a class action without court approval.

Rule 58 contemplates two basic situations. In one, the clerk enters final judgment according to Rule 79(a) without any direction from the court; in the other, the clerk awaits the court's approval of the judgment before effectuating it by entry in the civil docket.

In case of (1) a general verdict of a jury, or (2) a determination by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, or (3) a written agreement for judgment for a sum certain or denying relief, Rule 58(1) requires the clerk immediately to enter judgment on the civil docket in accordance with Rule 79(a). In these situations the clerk does not await the court's direction before entering judgment. The court, however, retains power to order otherwise where, for example, the court has before it a motion for judgment n.o.v. (Rule 50(b)) and directs that the clerk not enter judgment on a general verdict immediately. Voelkier v. Delaware, Lackawanna & Western R. Co., 31 F.Supp. 515, 516 (W.D.N.Y.1939). The language of Rule 58 and the policy underlying the prompt entry of judgment suggest that only in the most exceptional circumstances will a court not direct entry of judgment on a jury's general verdict.

Rule 58(a)(2) deals with the more complex situations where (1) a jury returns a general verdict accompanied by answers to interrogatories under Rule 49(b); (2) there is a special verdict; or (3) the court grants "other relief." Since these areas require specific judicial resolution, the rule requires the clerk to defer entry of judgment until the court approves its form.

Even in these situations, however, Rule 58(a)(2) emphasizes speed and simplicity by requiring the court to approve the form of judgment "promptly." An example of a situation within the ambit of Rule 58(a)(2) would be a special verdict returned pursuant to Rule 49. Such a verdict merely recites the facts found. It then becomes necessary for the court to apply the law to those facts and render a judgment. Until the court has done so, the clerk is not in a position to enter it on the docket.

The requirement that every judgment "be set forth on a separate document" makes clear that a judicial opinion alone cannot serve as a directive to a clerk to enter judgment pursuant to Rule 79(a). The judgment to be effective must satisfy two conditions:

(1) It must be set out on a separate document distinct from any opinion or memorandum (unless the opinion or memorandum includes a specific order for entry of judgment); and

(2) It must be entered according to Rule 79(a).

In the absence of either of these preconditions, the judgment is not effective; any appellate procedure is premature. Thus a concluding sentence in an opinion which merely states "the complaint is dismissed" is not an effective entry of judgment by itself. The requirement that the judgment be explicitly set forth on a separate document is not limited to situations where the court writes an opinion. It extends to all judgments, whether based on jury verdict or court decision.

For purposes of the other rules the date of effective entry is crucial. For example, a motion to amend findings or make additional findings under Rule 52(b) may be made not later than 10 days after entry of judgment. A motion for a new trial under Rule 59(b), a motion to alter or amend the judgment under Rule 59(e), and the awarding of a new trial on the court's own motion are subject to the same time limitation. The specific date of the notation of the judgment by the clerk pursuant to Rule 79(a) constitutes the date of effective judgment for purposes of the above rules.

In accord with the policy of prompt entry of judgment, Rule 58 provides that the entry of judgment shall not be delayed for the taxing of costs. Thus, judgment can be entered with the notation "with costs," leaving the exact amount for later determination. "The postponement of judgment until after the amount of costs can be determined is contrary to the letter and purpose of Rule 58." Danzig v. Virgin Isle Hotel, Inc., 278 F.2d 580, 582 (3rd Cir.1960).

Rule 58 effects a major change in Massachusetts practice. Under the previous separate procedural systems for actions at law and suits in equity, a "judgment" was a final decision at law while a "decree" was the terminal document in a suit in equity. With the adoption of Rule 2, both situations are covered by the one term: Judgment.

The practice heretofore in "equity" cases required the party in whose favor a decree was entered to submit to the court the form of the decree. S.J.C. Rule 2:44; Super.Ct. Rule 82.

The last sentence of Federal Rule 58 discourages such submissions, but Massachusetts Rule 58 has been drafted to accord specifically with familiar practice.

Rule 59: New Trials: Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the Commonwealth; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the Commonwealth. A new trial shall not be granted solely on the ground that the damages are excessive until the prevailing party has first been given an opportunity to remit so much thereof as the court adjudges is excessive. A new trial shall not be granted solely on the ground that the damages are inadequate until the defendant has first been given an opportunity to accept an addition to the verdict of such amount as the court adjudges reasonable. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the Court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Effective July 1, 1974.

Reporter's Notes (1996): With the merger of the District Court rules into the Mass.R.Civ.P., minor differences which had existed between Mass.R.Civ.P. 59 and Dist./Mun.Cts.R.Civ.P. 59 have been eliminated (most of which concerned references to jury trial).

Reporter's Notes to Rule 59(e), as amended, **1994** (Third paragraph from end): A motion under Rule 59(e) (taken with only slight changes from Federal Rule 59(e)), authorizes the court to alter or amend a judgment provided the motion is served within 10 days of entry of judgment. Since such a motion affects the finality of the judgment, it tolls the time for taking an appeal from the judgment; the time does not begin to run again until after disposition of the motion. It should be noted that, as in the case of a motion for new trial under Rule 59(b), the motion to alter or amend judgment under Rule 59(e) must be served not later than 10 days after entry of judgment. See Arthur D. Little, Inc. v. East Cambridge Savings Bank, 35 Mass.App.Ct. 734, 743, note 7, 625 N.E.2d 1383 (1994), commenting on a prior misstatement in these Reporters' Notes that a motion under Rule 59(e) must be "filed" within 10 days of entry of judgment. The difference between service and filing should be emphasized. Service is accomplished pursuant to Rule 5(b) by delivery or mail to all parties or their attorneys; the papers "shall be filed with the court either before service or within a reasonable time thereafter." Rule 5(d). See Albano v. Bonanza International Development Co., 5 Mass.App.Ct. 692, 369 N.E.2d 473 (1977).

Reporter's Notes (1973): Rule 59(a) allows the court to grant a new trial as to any or all of the parties or as to any or all of the issues. This power applies to both jury and non-jury cases and is entirely discretionary. Yates v. Dann, 11 F.R.D. 386 (D.Del.1951). This provision seeks to limit the issue on retrial to those which the court considers were not properly adjudicated in the first trial. Thus a partial new trial may be granted as to liability alone, if the court considers that the damages have been properly ascertained. Calaf v. Fernandez, 239 F. 795 (1st Cir.1917). Conversely, as in Yates, supra, the new trial is often limited to the issue of damages, if liability has been properly determined.

The partial new trial device may only be used if the issues as to which the new trial is ordered are so distinct and independent from the remainder of the case that they may be separately tried without injustice. If the issues or parties to which the motion is addressed are not severable or are interwoven with the remaining issues, the court may not order a partial retrial. Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931).

In conformity with the spirit of the entire Federal Rules, Rule 59(a) also provides that in non-jury cases "the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law and direct the entry of a new judgment."

The provisions of Rule 59(a), in most instances, substantially follow former Massachusetts practice. The grounds for a new trial are unchanged.

Rule 59(a) treats two types of cases: (1) actions tried by a jury and (2) actions tried without a jury. In the first classification new trials may be granted for any of the reasons for which new trials have heretofore been granted in actions at law. In the second, new

trials may be granted "for any of the reasons for which rehearings have heretofore been granted in suits in equity." This latter standard applies both to jury-waived actions and actions in which equitable relief is sought.

Rule 59(a) incorporates the remittitur and additur provisions of G.L. c. 231, § 127. While Federal Rule 59(a) does not specifically refer to the remittitur, established federal practice allows it, within the discretion of the trial judge. Neese v. Southern Ry., 350 U.S. 77, 76 S.Ct. 131, 100 L.Ed. 60 (1955). The additur, however, is not allowed in the federal system. Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1934). This distinction is not attributable to any language of Federal Rule 59(a); it is based upon the Supreme Court's interpretation of the Seventh Amendment. The decision in Dimick does not bind the state courts because the states are not bound by the provisions of the Seventh Amendment, either directly, Pearson v. Yewdall, 95 U.S. 294, 24 L.Ed. 436 (1877), or by reason of its being incorporated into the due process clause of the Fourteenth Amendment. Walker v. Sauvinet, 92 U.S. 90, 23 L.Ed. 678 (1875).

The possibility remains that the additur could be held unconstitutional under Article 15 of the Massachusetts Declaration of Rights. The California Supreme Court held the additur unconstitutional under similar language of the California Constitution. See Dorsey v. Barba, 38 Cal.2d 350, 357, 240 P.2d 604, 608 (1952).

The promulgation of Rule 59(a) by the Supreme Judicial Court does not constitute a binding decision that the Massachusetts additur provision is constitutional under Article 15. The promulgation is analogous to an advisory opinion. Advisory opinions are not adjudications by the court and do not fall within the doctrine of stare decisis; thus if the same question arises later in the course of other litigation, the Court is obliged to consider it anew, unaffected by the advisory opinion. Dodge v. Prudential Insurance Company of America, 343 Mass. 375, 379-380, 179 N.E.2d 234, 239-240 (1961).

The time limit for making a motion under Rule 59(b) is computed from the date of effective entry of judgment under Rule 58. The wording of 59(b), however, allows a motion to be made both before or after the entry of judgment. Patridge v. Presley, 189 F.2d 645 (D.C.Cir.1951); McCulloch Motors Corp. v. Oregon Saw Chain Corp., 245 F.Supp. 851 (S.D.Cal.1965).

Some courts have held, however, that a motion for a new trial made prior to the entry of judgment is to be taken as denied by a subsequent entry of judgment. Mosier v. Federal Reserve Bank of New York, 132 F.2d 710 (2nd Cir.1942); Agostino v. Ellamer Packing Co., 191 F.2d 576 (9th Cir.1951).

Generally, present federal practice allows the motion to be made either before or after entry of judgment. This is evidenced by the fact that the Supreme Court adopted the words "not later than" (rather than the proposed "within") 10 days after entry of

judgment. Furthermore, Rule 59(a) allows the court to open judgment "if one has been entered" (emphasis supplied) in response to a motion by a party.

Except for motions made during the trial or hearing, Rule 7(b) requires that the motion be in writing and state specifically the grounds and the relief or order sought. A motion under Rule 59 which does not meet the requirements of Rule 7(b) will be insufficient and considered a nullity. National Farmers Union Auto & Casualty v. Wood, 207 F.2d 659 (10th Cir.1953); Collins v. Risner, 22 F.R.D. 14 (E.D.Pa.1958). The exception in Rule 7(b) refers to the situation where a motion is made "during the trial or hearing" as, for example, during the actual trial or immediately after pronouncement of the verdict. In such a case, the motion need not be in writing. See Douglas v. Union Carbide Corp., 311 F.2d 182, 185 (4th Cir.1962).

Because a motion under Rule 59(b) affects the finality of judgment and tolls the time for taking an appeal, the 10-day limit may not be enlarged by the court. Rule 6(b). Some authority indicates that the parties themselves can extend the time, Whayne v. Glenn, 114 F.Supp. 784 (W.D.Ky.1953); however, the safer view is that Rule 6(b) bars any such extension. John E. Smith's Sons Co. v. Lattimer Foundry & Machine Co., 239 F.2d 815 (3rd Cir.1956).

The 10-day period, it should be emphasized, begins to run from the date of effective entry of judgment under Rule 58. This provision applies even though a party has not received notice of the judgment under Rule 77(d) from the clerk or adverse party; or even if the clerk fails to record a correct copy of the judgment as required by Rule 79(b).

A motion under Rule 59 suspends the finality of the judgment and tolls the time for appeal. It is established in federal practice that an amendment may be made to a motion for a new trial. For example, the court can allow a subsequent amendment of the motion to state additional or different grounds. Alcavo v. Jean Jordeau, Inc., 3 F.R.D. 61 (D.N.J.1942). The weight of judicial authority, however, supports the view that such an amendment may not be made after the 10-day period has elapsed. McCloskey v. Kane, 285 F.2d 297 (D.C.Cir.1960); Marks v. Philadelphia Wholesale Drug Co., 125 F.Supp. 369 (E.D.Pa.1954). The court has the power to grant a new trial on its own initiative for any reason not stated in the motion, provided the court acts within the 10-day period.

Rule 59(b) substantially changes former Massachusetts practice. The rule allows a motion for new trial after judgment has been entered, while the practice in Massachusetts was that a new trial may be ordered at any time before judgment. The difference springs from the differing meaning of "judgment". See Reporters' Notes to Rule 54.

The 10-day deadline under Rule 59(b) enlarges the former three day period for jury cases. Like Rule 59(b), former Massachusetts practice required that the motion be in writing. By statute and court rule, hearings supported by affidavits on motions for a new trial were allowed in Massachusetts, G.L. c. 231, § 127; Super.Ct.Rules 46 and 55. The state rules

also provided that unless an application for hearing was made within 10 days of filing of the motion, the trial judge could act upon the motion without a hearing.

Under Rule 59(c), when a motion is supported by affidavits, the latter must be filed with the motion. Former practice allowed the affidavits to be filed at the hearing.

Rule 59(d), taken unchanged from Federal Rule 59(d), substantially departs from former Massachusetts practice. It allows the court, on its own initiative, to order a new trial "for any reason for which it might have granted a new trial on motion of a party." The second part of Rule 59(d) allows the trial judge to grant a motion for a new trial for a reason not stated in the motion. Under prior law, in jury cases, a new trial could be ordered only on motion and only for the reasons set forth in the motion.

Rule 59(d) continues the former Massachusetts practice of allowing the parties a hearing in any action proposed to be taken sua sponte by the trial judge, and continues to require that the court specify the grounds for whatever action it takes.

A motion under Rule 59(e) (taken with only slight changes from Federal Rule 59(e)), authorizes the court to alter or amend a judgment provided the motion is filed within 10 days of entry of judgment. Since such a motion affects the finality of the judgment, it tolls the time for taking an appeal from the judgment; the time does not begin to run again until after disposition of the motion.

Rule 59(e) encompasses many motions seeking relief of a type which technically might not be considered a motion for a new trial: for example, a motion for rehearing, reconsideration or vacation; a motion to amend a judgment of dismissal "without prejudice"; or one to vacate a dismissal for want of jurisdiction. Market v. Swift & Co., 173 F.2d 517 (2nd Cir.1949).

The significance of a motion under Rule 59(e) is that such a motion stops the appeal clock. If the relief sought does not fit under Rule 59(e) or is made later than 10 days after judgment, it is considered to fall within Rule 60(b), which does not toll the appeal time.

Rule 60: Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence,

surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of review, of error, of audita querela, and petitions to vacate judgment are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Effective July 1, 1974.

Reporter's Notes (1973): Rule 60 encompasses two basic situations: (a) the correction of mere clerical mistakes in the judgment or other part of the record, and (b) substantive relief from a final judgment. Included in Rule 60(b) are all possible grounds for relief from a final judgment. A motion under Rule 60(b) performs the same function as the former Massachusetts procedures of writ of review, writ of error, writ of audita querela and petition to vacate judgment. As will be noted below, Rule 60 preserves the substance of these remedies. But with the adoption of Rule 60, the relief is available through simple "motion" under Rule 60(b). In addition, Rule 60 does not prohibit the court from entertaining an independent action to relieve a party from a judgment.

A motion under Rule 60 is addressed to the trial judge's judicial discretion, and is generally not reviewable except for a clear abuse of discretion. Farmers Co-operative Elevator Association v. Strand, 382 F.2d 224 (8th Cir.1967). Further, because a Rule 60(b) motion does not affect the finality of the judgment, it does not toll the time for taking an appeal. Compare Rule 62(e).

Rule 60(a) is limited to the correction of purely clerical errors. Errors within the purview of Rule 60(a) include "misprisions, oversights, omissions, unintended acts or failures to act." First National Bank v. National Airlines, 167 F.Supp. 167 (S.D.N.Y.1958). In effect, Rule 60(a) merely seeks to ensure that the record of judgment reflects what actually took place. Substantive errors or mistakes are outside the scope of Rule 60(a). See Stowers v. United States, 191 F.Supp. 795 (N.D.Ga.1961) holding that failure to consider interest as an element of a judgment is a substantive matter beyond Rule 60(a).

Further, Rule 60(a) does not apply unless the mistake springs from some oversight or omission; it does not cover mistakes which result from deliberate action. Ferraro v.

Arthur M. Rosenberg Co., Inc., 156 F.2d 212 (2d Cir.1946). The word "record" in Rule 60(a) refers not only to process, pleadings, and verdict but also to evidentiary documents, testimony taken, instructions to the jury, and all other matters pertaining to the case of which there is a written record. Rule 60(a) covers mistakes or errors of the clerk, the court, the jury, or a party. The taking of an appeal does not divest the trial court of power to correct errors. However, once the case is docketed in the appellate court, the trial court can only grant relief after first obtaining the appellate court's leave.

Rule 60(b) affords a "party or his legal representative" a means of obtaining substantial relief from a "final judgment, order or proceeding." Interlocutory judgments thus do not fall within Rule 60(b). They remain subject to the complete power of the court rendering them to afford such relief from them as justice requires. This has long been the federal rule. John Simmons Co. v. Grier Brothers Co., 258 U.S. 82, 12 S.Ct. 196, 66 L.Ed. 475 (1922). Rule 60(b) leaves this unchanged. Rule 60(b) incorporates all possible grounds for relief from judgment; such relief must be sought by "motion as prescribed in these rules or by an independent action." The phrase "independent action" has been interpreted to mean, not that a party could still utilize the older common law and equitable remedies for relief from judgment, but rather "that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools." Klapprott v. United States, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1949). The court now has power "to vacate judgments whenever such action is appropriate to accomplish justice." Id. Thus, as presently interpreted, Rule 60(b) contains the substance of the older remedies while simplifying the procedure for obtaining such relief.

Rule 60(b)(1) allows relief for "mistake, inadvertence, surprise or excusable neglect." It applies to acts of the court, parties or third persons. Thus Rule 60(b)(1) has been held to permit granting of relief where the court overlooked one small item of damages concerned with the major issues of the case. Southern Fireproofing Co. v. R.F. Ball Construction Co., 334 F.2d 122 (8th Cir.1964). Similarly, the oversight of an attorney's law clerk in failing to serve a more definite statement of claim may be ground for vacating a judgment dismissing the complaint under the mistake or inadvertence clause of Rule 60(b)(1). Weller v. Socony Vacuum Oil Co. of New York, 2 F.R.D. 158 (S.D.N.Y.1941). Where a default judgment was based on a misunderstanding as to appearance and representation by counsel, relief was granted under Rule 60(b)(1). Standard Grate Bar Co. v. Defense Plant Corp., 3 F.R.D. 371 (M.D.Pa.1944).

The "excusable neglect" clause of the section has been frequently interpreted. It seems clear that relief will be granted only if the party seeking relief demonstrates that the mistake, misunderstanding, or neglect was excusable and was not due to his own carelessness. See Petition of Pui Lan Yee, 20 F.R.D. 399 (N.D.Cal.1957); Kahle v. Amtorg Trading Corp., 13 F.R.D. 107 (D.N.J.1952). The party seeking the relief bears the burden of justifying failure to avoid the mistake or inadvertence. The reasons must be

substantial. For example, the misplacing of papers in the excitement of moving an attorney's office was held not to constitute excusable neglect sufficient to relieve the party from a default judgment entered for failure to file an answer. Standard Newspaper Inc. v. King, 375 F.2d 115 (2nd Cir.1967). Likewise, ignorance of the rules of civil procedure has been held not to be "excusable neglect." Ohliger v. U.S., 308 F.2d 667 (2nd Cir.1962).

Rule 60(b)(2) affords a party relief from a final judgment, order or proceeding on the ground of newly discovered evidence.

The movant bears the burden of showing that the evidence could not have been discovered by due diligence in time to move for a new trial under Rule 59(b). See Flett v. W.A. Alexander & Co., 302 F.2d 321, 324 (7th Cir.), cert. denied, 371 U.S. 841, 83 S.Ct. 71, 9 L.Ed.2d 77 (1962):

"Rule 60(b) provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances."

It is also settled practice that the phrase "newly discovered evidence" refers to evidence in existence at the time of trial but of which the moving party was excusably ignorant. Brown v. Penn. R.R., 282 F.2d 522 (3rd Cir.1960), cert. denied 365 U.S. 818, 81 S.Ct. 690, 5 L.Ed.2d 696 (1961). The results of a new physical examination are not "newly discovered evidence" within the meaning of the Rules, Ryan v. U.S. Lines Co., 303 F.2d 430 (2nd Cir.1962).

Finally, the evidence must be of a material nature and so controlling as probably to induce a different result. Giordano v. McCartney, 385 F.2d 154 (3rd Cir.1967).

Rule 60(b)(3) allows relief from a final judgment, order or proceeding on the basis of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party".

The section does not limit the power of the court to:

1) entertain an independent action to enjoin enforcement of a judgment on the basis of fraud; or

2) set aside a judgment on its own initiative for fraud upon the court.

Since neither the fraud nor misrepresentation is presumed the moving party has the burden of proving by clear and convincing evidence that the alleged fraud or misrepresentation exists and that he is entitled to relief.

Prior to the adoption of Federal Rule 60(b), relief was afforded for extrinsic fraud, that is, fraud collateral to the subject matter, but denied for intrinsic fraud relating to the subject matter of the action. Because of difficulty in differentiation, Rule 60(b) explicitly abolishes the distinction, at least with respect to a timely motion under Rule 60(b)(3).

These distinctions may, however continue to exist with respect to the independent action and the action of the court on its own initiative.

Rule 60(b)(3) includes any wrongful act by which a party obtains a judgment under circumstances which would make it inequitable for him to retain its benefit. Fraud covered by Rule 60(b)(3) must be of such a nature as to have prevented the moving party from presenting the merits of his case. Assmann v. Fleming, 159 F.2d 332 (8th Cir.1947). See also U.S. v. Rexach, 41 F.R.D. 180 (D.P.R.1966).

Rule 60(b)(3) refers to "misconduct of an adverse party," and thus does not literally apply to the conduct of third persons. However, it is safe to assume that if the fraud is derivatively attributable to one of the parties (as for example, fraud by his attorney), it is within Rule 60(b)(3). Even if the fraud is not attributable to one of the parties, relief may still be available through an "independent action" or the residual clause, Rule 60(b)(6).

Rule 60(b)(4) allows relief from a void judgment; it gives no scope to the court's discretion. A judgment is either void or valid. Having resolved that question, the court must act accordingly.

An erroneous judgment is not a void judgment. A judgment is void only if the court rendering it lacked jurisdiction of the subject matter or of the parties, or where it acted in a manner inconsistent with due process of law.

Although Rule 60(b)(4) is ostensibly subject to the "reasonable" time limit of Rule 60(b), at least one court has held that no time limit applies to a motion under the Rule 60(b)(4) because a void judgment can never acquire validity through laches. See Crosby v. Bradstreet Co., 312 F.2d 483 (2nd Cir.) cert. denied, 373 U.S. 911, 83 S.Ct. 1300, 10 L.Ed.2d 412 (1963) where the court vacated a judgment as void 30 years after entry. See also Marquette Corp. v. Priester, 234 F.Supp. 799 (E.D.S.C.1964) where the court expressly held that clause Rule 60(b)(4) carries no real time limit.

Finally, a party may obtain relief from a void judgment through an independent action to enjoin its enforcement.

Rule 60(b)(5) affords relief if "the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." The time for moving under Rule 60(b)(5) is stated to be a "reasonable time", to be determined in light of all the circumstances of the case.

It is important to note that relief under this clause is available only where the judgment is based on a prior judgment which has been reversed or otherwise vacated. Rule 60(b)(5) may not be used as a substitute for appeal. It does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding. Berryhill v. United States, 199 F.2d 217 (6th Cir.1952).

Rule 60(b)(5) significantly affects appellate procedure where, for example, a judgment is based upon a prior judgment and the two judgments are appealed simultaneously. In this situation it would be proper for the appellate court to consolidate the two appeals and make a final adjudication based on both judgments. See Butler v. Eaton, 141 U.S. 240, 11 S.Ct. 985, 35 L.Ed. 713 (1891).

The third clause of Rule 60(b)(5) only applies to judgments having a prospective effect, as, for example, an injunction, or a declaratory judgment. It does not apply in the usual money damages situation because such a judgment lacks prospective effect. Ryan v. U.S. Lines Co., 303 F.2d 430 (2d Cir.1962). Specifically, the clause allows relief from a judgment which was valid and equitable when rendered but whose prospective application has, because of changed conditions, become inequitable. This power to grant relief from the prospective features of a judgment has always been clearly recognized in equity. See State of Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421 (1855).

Rule 60(b)(6) contains the residual clause, giving the court ample power to vacate a judgment whenever such action is appropriate to accomplish justice. Pierre v. Bemuth, Lembeke Co., 20 F.R.D. 116 (S.D.N.Y.1956). Rule 60(b)(6) is, however, subject to two important internal qualifications. First, the motion must be based upon some other reason than those stated in Rule 60(b)(1)-(5); second, the other reason urged must be substantial enough to warrant relief.

A motion under Rule 60(b)(5) or (6) must be made within a "reasonable time." A motion under Rule 60(b)(4) probably has, as noted above, no effective time limit.

Motions under Rule 60(b)(1)-(3) are also subject to a "reasonable time" limitation which may never exceed one year after the judgment, order or proceeding in question. Further, Rule 60(b) explicitly prohibits the enlargement of Rule 60(b) time limits.

The saving clause in Rule 60(b) which allows the court to set aside a judgment for fraud upon the court contains no time limit. Likewise, the time limitations of Rule 60(b) do not apply to the independent action preserved by the rule. Presumably, concepts of reasonableness and laches would control.

When equitable principles warrant relief a party may obtain relief even though time for a Rule 60(b) motion has expired, through an independent action on the basis of accident, fraud, mistake, or newly discovered evidence. West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702 (5th Cir.1954). See also the Federal Advisory Committee Note of 1946:

"If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action.

Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations."

It is not clear, however, just what statute of limitations applies.

In an independent action, the same requirements outlined above with respect to motions under Rule 60(b) must be met.

There should logically be no distinction between intrinsic or extrinsic fraud, if the independent action is based on fraud. See Rule 60(b)(3), discussed above. However, it has been held that the troublesome distinction between intrinsic and extrinsic fraud is still effective with respect to independent actions and that only extrinsic fraud will support such an action. Dowdy v. Hawfield, 189 F.2d 637 (D.C.Cir.) cert. denied 342 U.S. 830, 72 S.Ct. 54, 96 L.Ed. 628 (1951).

Although nothing in Rule 60(b) so specifies, the concepts of sound judicial administration suggest that the independent action should ordinarily be brought in the court (subject to statutory venue requirements) which heard the original action.

Generally, Rule 60(b) affords the same relief formerly available. The former procedures for such relief included:

(1) By general consent of all parties and the court. Brooks v. Twitchell, 182 Mass. 443, 447, 65 N.E. 843, 845 (1903). (2) By motion of the prevailing party within three months, G.L. c. 250, § 14. Marsch v. Southern New England Railroad, 235 Mass. 304, 305, 126 N.E. 519, 520 (1920). (3) Where the execution has been in no part satisfied, by petition to vacate judgment, brought within one year. G.L. c. 250, §§ 15-20. Gould v. Converse, 246 Mass. 185, 140 N.E. 785 (1923). Maker v. Bouthier, 242 Mass. 20, 136 N.E. 255 (1922). Shour v. Henin, 240 Mass. 240, 133 N.E. 561 (1922). (4) By writ of review, in some cases without petition, and generally but not always within one year. G.L. c. 250, § 21 et seq. Lynn Gas & Electric Co. v. Creditors National Clearing House, 235 Mass. 114, 126 N.E. 364 (1920). Carrique v. Bristol Print Works, 8 Met. 444, 446 (1844). Silverstein v. Daniel Russell Boiler Works, Inc., 268 Mass. 424, 167 N.E. 676 (1929). (5) By writ of error, usually within six years. Former G.L. c. 250, § 3 et seq. Lee v. Fowler, 263 Mass. 440, 443, 161 N.E. 910, 911 (1928). (6) By bill in equity to compel the vacation of the judgment and to restrain its enforcement. Brooks v. Twitchell, supra at 447, 65 N.E. at 845. Joyce v. Thompson, 229 Mass. 106, 118 N.E. 184 (1918). Nesson v. Gilson, 224 Mass. 212, 112 N.E. 870 (1916). Farquhar v. New England Trust Co., 261 Mass. 209, 158 N.E. 836 (1927).

In addition to the above, the remedy of audita querela also existed in Massachusetts, G.L. c. 214, § 1, but was rarely used.

Rule 61: Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Effective July 1, 1974.

Reporter's Notes (1973): Federal Rule 61 is adopted without change. It is declarative of existing Massachusetts law as expressed in former G.L. c. 231, §§ 132 and 144 and in the decided cases. See, e.g., Runshaw v. Bernstein, 347 Mass. 405, 407-408, 198 N.E.2d 293, 295-296 (1964).

Reporter's Notes (1996): With the merger of the District Court rules into the Mass.R.Civ.P., minor differences which had existed between Mass.R.Civ.P. 61 and Dist./Mun.Cts.R.Civ.P. 61 have been eliminated.

Rule 62: Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay; Exceptions — Injunctions and Receiverships. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the time for appeal from the judgment has expired. In the District Court, in the case of a default judgment, no execution shall issue until 10 days after entry of such judgment. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) Stay on Motion to Vacate Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for relief from a judgment or order made pursuant to Rule 60.

(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) Stay Upon Appeal. Except as otherwise provided in these rules, the taking of an appeal from a judgment shall stay execution upon the judgment during the pendency of the appeal.

(e) Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of the appellate court or of a single justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(f) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b) the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Amended April 18, 1980, effective July 1, 1980; amended effective July 1, 1996.

Reporter's Notes (1996): The 1996 amendment to Rule 62(a) retains in a new second sentence the procedure that had been applicable in the District Court prior to the merger dealing with default judgments. The "Comments" to Rule 62, as originally adopted in the District Court in 1975, explain the rationale for the District Court approach as follows:

This sentence insures a stay of executions on default judgments for a period of time similar to the stay of executions allowed for other judgments during the period in which they may be appealed. Unless extended, the period for appeal of judgments other than default judgments is ten days....

Reporter's Notes (1973): Federal Rule 62, which permits execution to issue immediately after judgment, has been modified to reflect existing Massachusetts law as to the period during which execution is automatically stayed. Federal Rules 62(e) and 62(f) are inapplicable to state practice and have been omitted.

Under Rule 62(a) execution is automatically stayed "until the time for appeal from the judgment has expired." Heretofore, in actions at law in the Superior Court, entry of judgment was delayed until the expiration of the 20-day period for claiming an appeal (former G.L. c. 231, § 96). This obviates provision for stay of execution. However, Rule 58 requires judgment to be entered immediately upon the determination of the rights of the parties. Rule 62(a) will automatically stay execution for 30 days (60 days if the Commonwealth or one of its officers or agencies is a party) following entry of judgment. See Appellate Rule 4. No bond will be required during the waiting period.

Formerly, in equity matters, under G.L. c. 214, § 29, no execution could issue upon a final decree of the Superior Court or the Supreme Judicial Court until the expiration of 20 days from entry of the decree. This was the period allowed by former G.L. c. 214, § 19 for appeal from the decree.

The automatic stay provision of Rule 62(a) does not apply to a judgment ordering an injunction or a judgment in a receivership action. In those cases, the judgment is

immediately enforceable, unless a stay is ordered by the court. This provision of Rule 62(a) must be read with Rule 62(c), which provides that when an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Rules 62(a) and (c) do not substantially alter prior Massachusetts practice with respect to the stay of enforcement of a judgment in an action for an injunction or in a receivership action. "Proceedings under a final decree are stayed under G.L. (Ter.Ed.) c. 214, § 19, but only after an appeal has been seasonably claimed and the appeal is entered.... During the time which must necessarily elapse before appeal can be perfected, there is a statutory power in the court that entered the decree.... to grant any needed injunction and to make any other proper interlocutory order, pending appeal. G.L. (Ter.Ed.) c. 214, §§ 21, 22." Carlson v. Lawrence H. Oppenheim Co., 334 Mass. 462, 465, 136 N.E.2d 205, 207 (1956).

Rule 62(b) is an abbreviated version of Federal Rule 62(b). References to Rules 50, 52 and 59 are omitted. The language of section (a) encompasses these situations since the time for claiming an appeal, as computed under Appellate Rule 4, is suspended during the pendency of such motions. A motion for relief from judgment under Rule 60 replaces those provisions of G.L. c. 250, dealing with writs of error, vacating judgment, and writs of review. Rule 62(b) states familiar Massachusetts practice requiring a bond before an application for such relief can stay proceedings to enforce a judgment.

Rule 62(d) declares prior practice. But because Rule 58 reverses the appeal/entry-of-judgment sequence, Rule 62(d) makes clear that the taking of an appeal stays execution upon the judgment during the pendency of the appeal.

Rule 62(e) also follows prior practice.

Rule 62(f) is a corollary of Rule 54(b), which deals with multiple claims or multiple parties, and allows judgments to be entered as to one or more, but fewer than all, claims or parties upon an express determination that there exists no reason for delay. Rule 62(f) allows the court to stay enforcement of such judgments until the entering of a subsequent judgment or judgments. The stay may relate to a period beyond the time for appeal of such judgments. Rule 62(f) also permits the court to prescribe whatever conditions may be necessary to protect the party in whose favor the judgment has been entered.

Rule 63: Disability of a Judge

If by reason of death, sickness, resignation, removal, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these

rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may, on assignment by the Chief Justice of such court, or in case of disability of such Chief Justice, by the senior justice present and qualified to act, perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

Reporter's Notes (1996): With the merger of the District Court rules into the Mass.R.Civ.P., minor differences which had existed between Mass.R.Civ.P. 63 and Dist./Mun.Cts.R.Civ.P. 63 have been eliminated.fective July 1, 1974.

Reporter's Notes (1973): Rule 63 closely follows Federal Rule 63 with the following additions: (1) The enumerated disabilities have been expanded specifically to include resignation and removal; (2) An assignment mechanism has been added.

Rule 63 permits any other judge regularly sitting in or assigned to the court in which the action was tried to perform the duties of the judge who by reason of some disability is unable to perform his own duties after a verdict has been returned or after he has filed findings of fact and conclusions of law. The rule provides, however, that only by assignment may the successor judge perform the duties of the disabled judge.

If the successor judge cannot perform his substituted duties satisfactorily either because he did not preside at the trial or "for any other reason", he may in his discretion grant a new trial. See St. Louis Southwestern Ry. Co. v. Henwood, 157 F.2d 337 (8th Cir.1946); Brennan v. Grisson, 198 F.2d 532 (D.C.Cir.1952).

Rule 64: Report of Case

(a) Courts Other Than District Court. The court, after verdict or after a finding of facts under Rule 52, may report the case for determination by the appeals court. If the trial court is of opinion that an interlocutory finding or order made by it so affects the merits of the controversy that the matter ought to be determined by the appeals court before any further proceedings in the trial court, it may report such matter, and may stay all further proceedings except such as are necessary to preserve the rights of the parties. The court, upon request of the parties, in any case where the parties agree in writing as to all the material facts, may report the case to the appeals court for determination without making any decision thereon. In an action commenced before a single justice of the supreme judicial court, the court may report the case in the circumstances above described to either the appeals court or the full supreme judicial court; provided further that a single justice of the supreme judicial court may at any time reserve any question of law for

consideration by the full court, and shall report so much of the case as is necessary for understanding the question reserved.

(b) District Court. Report of a case or a ruling by the court to the Appellate Division shall be governed by District/Municipal Courts Rules for Appellate Division Appeal 5.

Amended May 3, 1996, effective July 1, 1996.

Reporter's Notes (1996): The 1996 amendments to Rule 64 create new sections (a) and (b). Rule 64(a) contains the pre-existing language of Rule 64 of the Mass.R.Civ.P., while Rule 64(b) contains the language of Rule 64 of the now-repealed Dist./Mun.Cts.R.Civ.P. as it existed effective July 1, 1994. Rule 64(b), applicable to the District Court and Boston Municipal Court, merely refers to Rule 5 of the District/Municipal Courts Rules for Appellate Division Appeal, which sets forth the procedures for a report to the Appellate Division.

Prior to July 1, 1994, Rule 64 of the Dist./Mun.Cts.R.Civ.P. dealt with "Preservation of Issues and Appeal to the Appellate Division." Effective July 1, 1994, these matters can be found in the District/Municipal Courts Rules for Appellate Division Appeal. It should be noted, however, that the pre-July 1994 version of Dist./Mun.Cts.R.Civ.P. 64 may still have application to appeals of matters occurring before July 1, 1994. See Rule 1A of the District/Municipal Courts Rules for Appellate Division Appeal.

Reporter's Notes (1973): Rule 64 preserves the former report procedure which gives a trial judge discretionary power to obtain appellate court determination of controlling questions of law without the necessity of a prior judgment in the trial court. Amended Mass.G.L. c. 231, §§ 111, 112 provide the statutory foundation for this procedure. Cases must be reported to the appeals court, except that a case pending before a single justice may be reported to either appellate court. This accords with former Mass.G.L. c. 214, §§ 31, 31A.

An important aspect of the rule is its provision for the report of an interlocutory order. This provision is drawn from former Mass.G.L. c. 214, §§ 30, 30A; Mass.G.L. c. 231, § 111. Since there is no procedure for appeal of an interlocutory order, compare the federal practice, 28 U.S.C. § 1292(b), a judge's authority to report a decisive order is the only effective way to obtain appellate review at an early stage of litigation, regulating and perhaps even obviating further proceedings in the trial court.

Rule 64 must be read in conjunction with Appellate Rule 5 which provides that a report is the equivalent of a notice of appeal for purposes of the Massachusetts Rules of Appellate Procedure.

Rule 65: Injunctions

(a) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. In case a temporary restraining order is granted without notice, the application for a preliminary injunction shall be set down for hearing at the earliest possible time, and in any event within 10 days, and takes precedence of all matters except older matters of the same character; and when the matter comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(b) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. This subdivision (b)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(c) Security. Unless the court, for good cause shown, shall otherwise order, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of the Commonwealth or of a political subdivision of the Commonwealth or of any officer or agency of any of them.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order. Unless the court, for good cause shown, otherwise orders, an injunction or restraining order shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers,

agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Labor Disputes. These rules are subject to any statutory provisions relating to restraining orders and injunctions in actions involving or growing out of labor disputes.

Effective July 1, 1974.

Reporter's Notes (1996): With the merger of the District Court Rules into the Mass.R.Civ.P., minor differences which had existed between Mass.R.Civ.P. 65 and Dist./Mun.Cts.R.Civ.P. 65 have been eliminated. These differences were found in Rule 65(b)(2) (reference to jury trial) and Rule 65(e) (labor disputes). The merger of the two sets of rules, of course, does not serve to enlarge District Court jurisdiction. See Rule 82.

Reporter's Notes (1973): Rule 65 is taken with little change from Federal Rule 65. The order of the first two sections has been reversed, to conform with the usual sequence of litigation. The requirement of Rule 65(a) of an affidavit or verified complaint showing immediate and irreparable harm before a court will issue a temporary restraining order does not alter former Massachusetts law. Rule 65(a) contains a provision for the extension of a temporary restraining order, which is familiar to Massachusetts practice. See Stathopoulos v. Reeksting, 252 Mass. 542, 544, 147 N.E. 853, 854 (1925).

Rule 65(a), like former Massachusetts practice, gives a motion for a preliminary injunction precedence over all matters and allows an adverse party an opportunity to move to dissolve or modify a temporary restraining order.

Rule 65(b)(1) provides that no court shall issue an injunction unless proper notice is given to the adverse party; former Massachusetts practice also required notice, although the usual procedure had been an order to show cause. Under federal practice, although an order to show cause may itself constitute sufficient notice, a motion is the preferable procedure. Walling v. Moore Milling Co., 62 F.Supp. 378, 382 (W.D.Va.1945).

Rule 65(b)(2) provides for the consolidation of a hearing on an application for a preliminary injunction with a trial on the merits. This was not part of former Massachusetts practice. Under Rule 65(b)(2), the consolidation may be ordered before or after the commencement of the hearing of an application for a preliminary injunction. See Brotherhood of Railroad Carmen v. Chicago and N.W.Ry. Co., 354 F.2d 786, 787 (8th Cir.1965).

Former Massachusetts law contained no requirement that the plaintiff file a bond as a condition precedent to the issuance of either a temporary restraining order or preliminary injunction. See American Circular Loom v. Wilson, 198 Mass. 182, 211, 84 N.E. 133, 139 (1908); Weinberg v. Goldstein, 241 Mass. 259, 261, 135 N.E. 126, 127 (1922). The requirement of a bond was left to the court's discretion. Under Rule 65(c), a court also need not require a bond. Under the Federal Rules, courts have at times not required a

bond. Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780, 782-783 (10th Cir.1964); Ferguson v. Tabah, 288 F.2d 665, 675 (2d Cir.1961).

The language of Rule 65(d), emphasizing precision in the framing of injunctions and restraining orders, expresses former Massachusetts practice (see e.g., forms of decree set out in Reed, Equity §§ 981-1014 (1952)), although the Reporters have found no case saying so explicitly. "Specificity has long been a hallmark of the well-drafted injunctive decree. An injunction circumscribes the defendant's conduct with the threat of punishments similar to those of the criminal law, and the defendant is entitled to fair notice [of the bounds] • • • Some defendants may take advantage of a vague decree intentionally." Developments in the Law-Injunctions, 78 Harv.L.Rev. 994, 1065 (1965).

Rule 65(e), which is new, is designed to show unmistakably that such anti-injunction statutes as G.L. c. 214, § 9A are not affected by the rule.

Rule 65.1: Security: Proceedings Against Sureties

Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

Effective July 1, 1974.

Reporter's Notes (1973): Rule 65.1 effects a substantial change in former Massachusetts practice. Formerly, a party who took a bond as security had to institute a separate action in contract to enforce the obligation of the sureties to the bond. Castaline v. Swardlick, 264 Mass. 481, 482, 163 N.E. 62 (1928). Rule 65.1, providing for enforcement on motion makes unnecessary the costly and lengthy process of a second civil suit. The rule provides for notice to those whose obligations are sought to be enforced. G.L. c. 214, § 9A clauses 2 and 3, requires that an undertaking be filed with the court when a preliminary injunction is issued in a labor dispute. A decree may be rendered upon such undertaking in the suit for the injunction; no second suit is necessary. The statute further states that the complainant and surety submit themselves to the jurisdiction of the court for the purpose of such undertaking. Both provisions accord with Rule 65.1.

That portion of Rule 65.1 providing that "each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom papers affecting his liability on the bond or undertaking may be served" does not substantially change former law. Apart from specific statutory provisions, one who

undertakes to be a surety on a bond is subject to process (to enforce the obligation) by virtue of his being an inhabitant of the Commonwealth or by virtue of his minimal contact with the state under Massachusetts G.L. c. 223A, § 3(f), the "long-arm" statute.

G.L. c. 175, § 151 provides that foreign fidelity and corporate insurance companies must file a power of attorney appointing the commissioner of insurance lawful attorney upon whom legal process may be served. This statute will not affect Rule 65.1; the rule merely permits the party proceeding against the surety to "serve" the surety by filing the necessary papers with the clerk.

The Reporters take the position that the notice which must be mailed by the clerk of court to the surety under Rule 65.1 need not comply with the requirements of seal and teste prescribed by Part II, c. 6, art. 5 of the Massachusetts Constitution. The enforcement of liability against the surety is not a new action. While notice may be the means for bringing a defendant into court for all purposes connected with an already commenced action, an order of notice is not a writ within the meaning of Part II, c. 6, art. 5 of the Massachusetts Constitution. Taplin v. Atwater, 297 Mass. 302, 306, 8 N.E.2d 786, 788 (1937).

Rule 65.2: Redelivery of Goods or Chattels

In an action for the redelivery of goods or chattels brought pursuant to General Laws c. 214, sec. 3, an order that a party redeliver goods or chattels may be made ex parte, pursuant to the provisions of Rule 65(a) and existing law governing the issuing of restraining orders, or with notice and hearing, pursuant to Rule 65(b) and existing law governing the issuing of preliminary injunctions. No restraining order or preliminary injunction for the redelivery of goods or chattels shall issue except upon the applicant's giving security, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Adopted December 22, 1978, effective January 15, 1979.

Reporter's Notes (1996): With the merger of the District Court Rules into the Mass.R.Civ.P., Rule 65.2 has now been made applicable to the District Court. However, the applicability of this rule to the District Court does not serve to grant jurisdiction to the District Court over actions to compel redelivery of goods pursuant to G.L. c. 214, § 3. This statute grants jurisdiction only to the Supreme Judicial Court and the Superior Court. See Rule 82.

Reporter's Notes (1979): Two Massachusetts statutes govern actions to recover goods or chattels: G.L. c. 247 (Replevin) permits plaintiff to obtain the disputed property prior to trial, without hearing, and without justification such as imminent destruction, transfer, or concealment of the property. This statute is probably unconstitutional (see Fuentes v.

Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972)). The other statute, G.L. c. 214, § 3 gives the Supreme Judicial Court and Superior Court equitable jurisdiction to order redelivery of goods or chattels taken or detained from the owner, without requiring the owner first to establish inadequacy of the legal remedy. "The supreme judicial and superior courts shall have original and concurrent jurisdiction of the following cases: (1) Actions to compel the redelivery of goods or chattels taken or detained from the owner . . ." G.L. c. 214, § 3.

As G.L. c. 214, § 3 provides a legal vehicle for recovery of property, its marriage with Rule 65 (Injunctions) provides a simple and flexible procedure, affording the same constitutional safeguards as a detailed statute. Although "injunction" and "restraining order", as used in Rule 65, literally imply restraint or inaction, the rule clearly also covers any order requiring affirmative conduct, the so-called "mandatory injunction", International Longshoremen's Ass'n, Local No. 1291 v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 75-76, 88 S.Ct. 201, 207-208, 19 L.Ed.2d 236 (1967).

Rule 65(a) allows the ex parte recovery of property only "if it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition." Even then, the time provisions of Rule 65(a) provide a wronged defendant the opportunity to obtain an immediate hearing. Likewise, plaintiff seeking a preliminary injunction must establish (1) an irremediable deprivation of his rights during pendency of the action; and (2) the likelihood that he will ultimately succeed on the merits. Under Rule 65.2, these provisions control the pre-trial recovery of property.

Unlike Rule 65(c), Rule 65.2 requires security in all cases, although it leaves the amount to the determination of the court. Because the pre-trial recovery of property is so constitutionally sensitive, security should be mandatory. On the other hand, the rule does not impose an arbitrary dollar requirement (as, for example, twice the value of the property). Sometimes defendant has wrongfully taken or withheld plaintiff's property as security for a disputed debt less than the value of the property. Certainly, a bond in the amount of the debt is adequate.

Rule 65.3: Proceedings for Civil Contempt

(a) Applicability. Enforcement of compliance with the following court orders shall be sought by means of a separate civil proceeding denominated as a "civil contempt proceeding":

(1) temporary restraining orders, preliminary or permanent injunctions pursuant to Rule 65, or stipulations in lieu thereof;

(2) orders issued pursuant to Rule 70; and

(3) any other orders or judgments entered pursuant to these rules, for the violation of which civil contempt is an appropriate remedy, except for matters cognizable under Rules 26(c), 36(a) and 37.

(b) Commencement. A civil contempt proceeding shall be commenced by the filing of a complaint for contempt with the clerk of the court whose injunction, stipulation, order or judgment is claimed to have been violated. No entry fee shall be required in connection with the filing of the complaint for civil contempt. The proceeding shall be considered part of the civil action out of which the contempt arose.

(c) Contents of the Complaint. The complaint for civil contempt shall:

(1) contain a complete verbatim statement of the injunction, stipulation, order or judgment involved, or a copy thereof if available, and the name of the issuing judge where appropriate;

(2) identify the court that issued the injunction, order or judgment, or in which the stipulation was filed:

(3) contain the case caption and the docket number of the case in which the injunction, order or judgment was issued, or the stipulation was filed;

(4) include a short, concise statement of the facts on which the asserted contempt is based;

(5) include a prayer for the issuance of a summons as specified in subsection (d) below;

(6) be verified or supported by affidavits complying with the provisions of Rule 11(e); and

(7) otherwise comply with the provisions of Rules 8, 9, 10 and 11.

(d) Summons. The summons shall issue only on a judge's order and shall direct the parties to appear before the court not later than ten days thereafter for the purpose or purposes specifically stated therein of: scheduling a trial, considering whether the filing of an answer is necessary, holding a hearing on the merits of the complaint, or considering such other matters or performing such other acts as the court may deem appropriate.

(e) Service of the Summons and Complaint. A copy of the summons, the complaint for contempt, and any accompanying affidavits shall be served, in hand, upon the defendant in accordance with the provisions of Rule 4, unless the court orders some other method of service or notice.

(f) Answer. Unless the court otherwise orders, the defendant shall serve an answer within twenty days after service of the summons and complaint for contempt. The answer shall comply with the provisions of Rules 8, 9, 10 and 11.

(g) Discovery. A party, by motion, may seek an order permitting discovery. Such motion shall set forth the particular need for discovery, the type of discovery sought and the time required for obtaining the discovery. A motion for discovery in a civil contempt proceeding may be heard on three days' notice.

(h) Trial. The complaint for contempt shall be tried upon the facts in accordance with Rule 52. The court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58.

Adopted May 25, 1982, effective July 1, 1982.

Reporter's Notes (1996): With the merger of the District Court Rules into the Mass.R.Civ.P., Rule 65.3 is now applicable in the District Court. It had previously been held by the Supreme Judicial Court that Rule 65.3 was not applicable in the District Court, although the provisions thereof might have been applied by analogy in District Court civil contempt proceedings. Mahoney v. Commonwealth, 415 Mass. 278, 612 N.E.2d 1175 (1993)

Reporter's Notes (1982): Prior to the adoption of this rule, no provisions existed in the Rules of Civil Procedure to specifically govern civil contempt proceedings. See Nolan, Equitable Remedies, 31 Massachusetts Practice, § 193. There is no analogous federal rule.

Under Rule 65.3(a) the rule is made applicable to all proceedings to enforce compliance with temporary, preliminary or permanent injunctions; stipulations in lieu thereof; Rule 70 orders; and other similar orders "for the violation of which civil contempt is an appropriate remedy." It is not applicable to discovery sanctions, under Rules 26(b), 36(a) and 37, nor to small claims cases (Rule 81(a)(7)). This rule excludes discovery sanctions because when a discovery order is violated, the parties are usually already before the court and there are a wide range of available sanctions, other than contempt. A distinct civil contempt proceeding, with its own summons, pleadings, and potential evidentiary hearing, seems unnecessary in the context of most disputes over the violations of a discovery order.

Section (b) tells how to commence a civil contempt proceeding, and clarifies that such proceeding shall have the same docket number and be otherwise treated as part of "the civil action out of which the contempt arose." Consequently, no entry fee is required.

Rule 65.3(c)(1)-(7) prescribes what must be included in a civil contempt complaint, and, because of the serious nature of an allegation of civil contempt, requires verification or accompanying appropriate affidavits.

Rule 65.3(d) endows the summons with unusual significance. Because of the expedited and grave nature of a civil contempt proceeding, the summons (i) "issues only on a judge's order," (ii) must "direct the parties to appear before the court not later than ten days" after issuance of the order; and (iii) must specifically state what will happen when the parties appear. The rule places the responsibility on the party filing a complaint for contempt to obtain the summons.

Rule 65.3(d) is constructed to meet two different goals. The first is to permit flexibility with respect to what occurs when the parties first appear in answer to the summons.

Depending on the nature of the alleged contempt, a case may or may not benefit from the filing of an answer, expedited discovery, or an immediate hearing. Consequently, the rule gives wide discretion to the judge to determine what should happen when the parties appear: a "hearing on the merits," if it makes sense to have that quickly; scheduling a trial; considering dispensing with an answer; expediting discovery, if discovery is necessary; requiring initial compliance by the defendant pending a hearing; considering other appropriate matters; or requiring other appropriate acts to be performed.

The second goal is to eliminate, to the extent reasonably possible, surprising the parties. The parties should know, for example, whether a trial will take place when they appear in response to the summons. The word "specifically" in "for the purpose or purposes specifically stated therein" is to emphasize the importance of informing the parties what to expect. To merely place in each summons a laundry list of everything which might happen or "whatever the court may deem appropriate" will not comply with either the language or spirit of this rule.

Rule 65.3(e) provides that service of the summons and complaint and "any accompanying affidavits" will normally be "in hand."

Rule 65.3(f) provides for an answer within 20 days, unless "the court otherwise orders" in the summons or when the parties appear. The judge may, for instance, decide an answer is unnecessary, or that it should be served in fewer than 20 days.

Under Rule 65.3(g) a party must seek an "order permitting discovery," unlike the normal discovery provisions which permit parties, on their own, to initiate discovery. The rule requires the parties seeking discovery to particularize the need for, type, and timing of the discovery sought. The purpose is to constrict the more wide-open discovery which can occur in other proceedings. It is important to note that in an unusual case, the court can order discovery in the initial summons under Rule 65.3(d) or at the hearing which occurs when the parties respond to the summons.

Rule 65.3(h) makes Rules 52 (Findings by the Court) and 58 (Entry of Judgment) applicable to civil contempt proceedings.

Rule 66: Receivers

(a) An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of this Commonwealth and with the laws thereof. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

(b) Every receiver, within thirty days after his appointment, shall file a detailed inventory of the property of which he has possession or the right to possession, with the estimated values thereof, together with a list of the encumbrances thereon; and also a list of the creditors of the receivership and of the party whose property is in the hands of the receiver, so far as known to him.

(c) Every receiver shall file, not later than the fifteenth day of February of each year, a detailed account under oath of his receivership to and including the last day of the preceding year, substantially in the form required for an account by a conservator in the probate courts, together with a report of the condition of the receivership. He shall also file such further accounts and reports as the court may order.

(d) When an attorney at law has been appointed a receiver, no attorney shall be employed by the receiver or receivers except upon order of court, which shall be made only upon the petition of a receiver, stating the name of the attorney whom he desires to employ and showing the necessity of such employment.

(e) No order discharging a receiver from further responsibility will be entered until he has settled his final account.

(f) The court, in its discretion, may relieve any receiver from any requirement imposed by sections (b)-(e) of this rule.

Effective July 1, 1974; amended June 24, 2009, effective July 1, 2009.

Reporter's Notes (2009): The 2009 amendments reflect changes resulting from the adoption of the Massachusetts Uniform Probate Code.

Reporter's Notes (1996): With the merger of the District Court Rules into the Mass.R.Civ.P., minor differences which had existed between Mass.R.Civ.P. 66 and Dist./Mun.Cts.R.Civ.P. 66 have been eliminated.

Reporter's Notes (1973): Rule 66 presents no conflict with prior Massachusetts practice; Rule 66(a) indeed explicitly incorporates existing law. See G.L. c. 200, 205, and 206. Succeeding subsections of the rule incorporate Super.Ct. Rule 91 in its entirety. Rule 66(e) dealing with discharge of a receiver accords with S.J.C. Rule 2:47. Rule 66(f) imparts flexibility to permit abrogation of requirements in appropriate cases, as for example a rent receivership.

Rule 67: Deposit in Court

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part

of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of any applicable statute or rule.

Effective Date July 1, 1974.

Reporter's Notes (1973): While no prior statute or rule of court in Massachusetts authorized deposits in court, some prior statutes and rules of court did deal with the mechanics of comparable procedures. Among these is the familiar "payment into court under the common rule." See Super.Ct. Rule 42. Another is G.L. c. 231, § 40, which authorizes the payment of money into court in an interpleader action. See also G.L. c. 35, § 23; S.J.C. Rule 2:29; Super.Ct. Rule 41. None of these statutes or rules however, has provided for the deposit of a non-monetary object into court as Rule 67 does.

Rule 68: Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment exclusive of interest from the date of offer finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Effective Date July 1, 1974.

Reporter's Notes (1973): With one slight exception Rule 68 is the same as Federal Rule 68. The addition incorporates the provision of G.L. c. 231, § 75 excluding interest from a judgment in determining whether it is more favorable than the offer. It does not, however, prevent the plaintiff's obtaining interest on the judgment from the date of the offer if the judgment obtained is not more favorable than the offer. Merely because interest is excluded in determining whether the judgment is more favorable than the offer, it does not logically follow that the plaintiff should be deprived of interest when the judgment is not more favorable than the offer. G.L. c. 231, § 75 did not deprive the plaintiff of interest from the date of the offer. Because the defendant has the use of the money even

from the date of the offer there is no reason why he should not pay interest to the plaintiff for the use of that money; to provide otherwise, would be tantamount to assessing a penalty against the plaintiff for not accepting an offer.

Rule 68 slightly changes preexisting Massachusetts practice. The offer of judgment is no longer limited to those suits "wherein damages only are sought to be recovered." G.L. c. 231, § 74. The requirement that the offer be made at least 10 days before the trial begins is new to Massachusetts practice, which did not specify a time for the offer; the time for acceptance of an offer was limited to 10 days. G.L. c. 231, § 74 permitted such further time as the court allowed.

Rule 68 clearly identifies the party entitled to make an offer of judgment. The federal rule permits any "party defending against a claim" to make such offer. This phrase has been interpreted as covering by its express terms either an original defendant or a plaintiff defending against a counterclaim. The term defending party "does not confine itself to a defendant in the technical sense." Moore, Federal Practice, § 68.02, p. 2303. Rules 8(a) and 13(a) make clear that the word "claim" would refer also to a counterclaim. The Massachusetts statute (G.L. c. 231, § 74), permitted any "defendant in an action . . ." to make an offer of judgment. No reported case has defined the term "defendant". Presumably the word as used in G.L. c. 231, § 74 included plaintiffs defending against a counterclaim. Rule 68 clarifies this matter.

Rule 68 requires the defending party to serve upon the adverse party his offer of judgment. The court enters the picture only after acceptance. At that time either party may file "the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment."

Rule 68 specifies that the mere fact of an offer's nonacceptance does not preclude a subsequent offer. Massachusetts law had previously been silent on this point.

Rule 69: Execution

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings on and in aid of execution shall be in accordance with applicable statutes. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.

Effective Date July 1, 1974.

Reporter's Notes (1973): Rule 69 is a shortened version of Federal Rule 69. It provides that the procedure on execution shall accord with existing statutes. See G.L. c. 235 and G.L. c. 236. In aid of judgment or execution, depositions may be taken in accordance with these rules.

Rule 70: Judgment for Specific Acts: Vesting Title

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the Commonwealth, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution upon application to the clerk.

Effective Date July 1, 1974.

Reporter's Notes (1996): With the merger of the District Court Rules into the Mass.R.Civ.P., minor differences which had existed between Mass.R.Civ.P. 70 and Dist./Mun.Cts.R.Civ.P. 70 have been eliminated. These differences related to judgments for specified types of equitable relief not within District Court jurisdiction. The elimination of these differences does not broaden District Court jurisdiction. See Rule 82.

Reporter's Notes (1973): Rule 70, with a few minor changes, is the same as Federal Rule 70. Former Massachusetts practice with respect to enforcement of judgments for specific acts was generally less permissive, making no provision for alternative performance by a person appointed by the court.

G.L. c. 183, §§ 43, 44 operates identically to that portion of Rule 70 concerning the vesting of title to real property "in the party entitled thereto by the decree". Rule 70 however applies also to personal property.

Rule 70 allows the application of what are essentially legal remedies to the enforcement of equitable decrees. The effect is to ensure swift performance of obligations established by the court.

Rule 71: Process in Behalf of and Against Persons Not Parties

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

Effective date July 1, 1974.

Reporter's Notes (1973): Rule 71 is the same as Federal Rule 71. It permits a person, not a party to the action, in whose favor an order has been made, to enforce obedience to the order by the same process as if he were a party. See Woods v. O'Brien, 78 F.Supp. 221 (D.Mass.1948). An example of the operation of this rule would be a foreclosure in which the court orders the property delivered to the purchaser. The purchaser is entitled to any process to enforce the order to which a party might be entitled. See 12 Wright & Miller, Federal Practice & Procedure 80 (1973). Rule 71 requires that the order sought to be enforced be made in favor of that person. It is not enough that the person seeking to enforce obedience be indirectly benefited by the decree. See United States v. American Society of Composers, Authors and Publishers, 341 F.2d 1003, 1007-1008 (2d Cir.1965), cert. denied, 382 U.S. 877, 86 S.Ct. 160, 15 L.Ed.2d 119 (1965). The court there held that a radio broadcaster not a party to the government's antitrust action against a music licensor lacked standing to move to punish the licensor for contempt for alleged failure to comply with the decree.

The final clause of Rule 71 does not purport to affect the general rule that ordinarily a judgment may be enforced only against a party. It merely provides that in those rare cases where such a right exists, the person in question is liable to the same process for enforcing obedience to the order as if he were a party. Suppose, for example, the person knowingly aids or abets the disobeying of the injunction. See Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Corp., 288 Fed. 80 (D.C.N.Y.1923). The latter portion of Rule 71 will also apply to those situations, as under the discovery rules, where a person not a party may be held liable for expenses and attorney's fees. An order against such a person may be enforced by the same methods as if the person were a party. See 12 Wright & Miller, Federal Practice & Procedure 82 (1973).

Rule 77: Courts and Clerks

(a) Courts Always Open. Unless otherwise provided by law, the courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning process, and of making and directing all interlocutory motions, orders, and rules.

(b) Clerk's Office and Orders by Clerk. The clerk's office with a clerk or assistant clerk in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(c) Filing Date of All Papers Received by Clerk. The clerk shall date-stamp all papers whatsoever received by him, whether by hand or by mail. Any paper so received, whether stamped or not, shall be deemed to have been filed as of the date of receipt. If at any subsequent time, any party disputes the fact of such filing, the court shall determine the question, taking whatever evidence it deems appropriate. Proof of mailing shall constitute prima facie proof of receipt.

(d) Notice of Orders or Judgments. (Effective August 1, 2009). Unless an order or judgment is entered in open court in the presence of the parties or their counsel, the clerk shall immediately upon the entry of an order or judgment serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4 of the Massachusetts Rules of Appellate Procedure or Rule 4 of the District/Municipal Courts Rules for Appellate Division Appeal, and except as relevant to a motion for relief from judgment under Rule 60(b)(6) of the Massachusetts Rules of Civil Procedure.

(e) Transmittal of Papers. In courts other than the District Court, at the direction of any judge of the court, the clerks for the several counties shall transmit the papers in any action from one county to another when a matter has been duly set down for hearing in a county other than that in which the action is pending. Pleadings, motions, and papers to be filed in such case shall be filed in the office of the clerk for the county in which the case is pending. The clerk for the county in which the case is heard shall certify the proceedings had in his county to the clerk for the county in which the case is pending and, at the direction of any judge of the court, shall return to such clerk all the papers, to be kept there on file.

When the court orders a change of venue, such order shall include a direction to the clerk to transmit all papers to the clerk for the county to which the action is transferred and thereafter all the papers shall be filed and all proceedings taken as if the action had been commenced in the county to which it is transferred.

Amended Dec. 2, 1983, effective Jan. 1, 1984; May 3, 1996, effective July 1, 1996; June 24, 2009, effective August 1, 2009.

Reporter's Notes (2009): Amendments to Rule 52(c) effective March 1, 2008 require findings of fact and rulings of law in jury-waived cases in the District Court if a party timely submits proposed findings and rulings. The March 2008 amendments were part of a group of amendments to the Massachusetts Rules of Civil Procedure in light of the adoption of the statewide one-trial system for civil cases. These amendments also deleted

Rule 64A, which provided that a party seeking rulings of law in jury-waived cases in the District Court must submit to the court Requests for Rulings of Law.

In light of the elimination of the procedure involving Requests for Rulings of Law, the 2009 amendment deleted the following sentence from Rule 77(d): "In the District Court, such notice shall indicate the court's ruling on any requests for rulings which may have been made." The deletion of this sentence is not intended to change the existing practice by which the clerk sends to the parties or counsel a copy of the court's findings and rulings.

Reporter's Notes (1996): The merger of the District/Municipal Courts Rules of Civil Procedure into the Massachusetts Rules of Civil Procedure necessitated minor changes to Rule 77. The language "for each county" previously appearing in the first sentence of Rule 77(b) has been deleted to take into account the fact that a county may contain a number of District Court divisions. A new second sentence has been added to Rule 77(d), drawn from now-repealed Rule 77(d) of the Dist./Mun.Cts.R.Civ.P., requiring that notice of entry of judgment in District Court civil actions must indicate "the court's ruling on any requests for ruling which may have been made." The last sentence of Rule 77(d) has also been amended to refer to the relevant rule governing appeal from the District Court to the Appellate Division of the District Court, namely Rule 4 of the District/Municipal Courts Rules for Appellate Division Appeal.

Some changes to now-repealed Rule 77 of the Dist./Mun.Cts.R.Civ.P. as result of the merger should also be noted. Previously, Rule 77(b) of the Dist./Mun.Cts.R.Civ.P. provided that the clerk's office was to be open on all days "except Sundays and legal holidays." This has been eliminated in favor of the Mass.R.Civ.P. version, excepting Saturdays, Sundays, and legal holidays. This should effect no change in existing District Court practice. The occasion of the merger of the two sets of rules also provided the opportunity to eliminate now-outdated references appearing in Rule 77(d) of the Dist./Mun.Cts.R.Civ.P. to a request for report and to a draft report, both of which were eliminated in 1994 with the adoption of the District/Municipal Courts Rules for Appellate Division Appeal.

Reporter's Notes (1973): Rule 77(a) is taken substantially from Federal Rule 77(a). It does not require the clerk's office to be physically open at all times for the filing of pleadings or other papers. (G.L. c. 220, § 6 provides that "Courts shall not be open on Sunday or a legal holiday, and courts, other than district courts, shall not be open on Saturday. . . .") Nor does this rule mean that "filing" may be accomplished by slipping the paper under the door of the clerk's office. It permits the filing of papers with the clerk, or with the judge if he so permits (see Rule 5(e)) at other than business hours and outside the courthouse.

Rule 77(b) requires the clerk's office to be open during business hours except Saturdays, Sundays and legal holidays. Business hours refers to normal business hours as observed

by the community. Rule 77(b) also authorizes the clerk to issue process and make entries which do not require allowance or order of the court. This confirms the authority conferred upon the clerk by Rule 55 (default), Rule 58 (entry of judgment) and Rule 68 (offer of judgment).

Rule 77(c) remedies the difficulties occasionally arising where a clerk returns for correction without endorsement of receipt, a paper received by him for filing.

Rule 77(d) requires the clerk, immediately upon entry of an order or judgment to serve a notice of entry by mail upon each party not in default, except where the order or judgment is entered in open court in the presence of the parties or their counsel. Such notice by mail is sufficient for all purposes under the rules. A party may, however, to ensure notice, serve notice of entry of a judgment or order in the manner provided in Rule 5.

Although under Rule 77(d) lack of notice does not authorize the court to relieve a party for failure to appeal within the time allowed, Appellate Rule 4 provides that upon a showing of excusable neglect the court may extend the time for appeal. A failure to learn of the entry of judgment could, in appropriate circumstances, so qualify. Denial of a motion to extend the time for appeal, where failure to appeal in a timely manner was due to a clerk's failure to give notice, has been held to constitute an abuse of discretion. See Commercial Credit Corp. v. United States, 175 F.2d 905 (8th Cir.1949).

Rule 77(e) does not appear in the federal rules. If a case is to be heard in a county other than the county where the case was properly commenced (e.g., because of consolidation) the case remains on the docket of the original county and all papers are filed there. After the hearing, the papers in the case are returned to the county where the action was commenced. However if a case is transferred in response to a court order for change of venue, all the papers in the case are transferred to the transferee county and all further papers are filed there.

Reporter's Notes, Mass R. Civ. P. : The purpose of this amendment is to remind lawyers that although Mass.R.Civ.P. 77(d) provides that "[l]ack of notice of the entry [of a judgment] by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed . . .", the lack of notice may be relevant to a motion for relief from judgment under Mass.R.Civ.P. 60(b)(6). See, for example, Chavoor v. Lewis, Mass.Adv.Sh. (1981) 1467, 422 N.E.2d 1353 (1981), in which a plaintiff, whose counsel averred that he had never received notification of a call of the list nor of entry of judgment, had the judgment vacated almost two years after judgment pursuant to Mass.R.Civ.P. 60(b)(6). See also 8A Smith and Zobel, Massachusetts Practice--Rules Practice, § 77.5, and citations therein.

Rule 78: Motion Day

The court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but a judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of such motions.

To expedite its business, the court may provide by order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

The court may require the filing of briefs, in such form and within such time as it may direct.

Effective date July 1, 1974.

Reporter's Notes (1973): The first paragraph of Rule 78 generalizes what are essentially housekeeping details in Super.Ct.Rules 62, 64 and 66 and includes a provision for flexibility governed by judicial discretion in allowing deviation from the established hearing procedure. This reservation of judicial discretion is similar to Super.Ct.Rule 47. See also, Worster v. Yeaton, 198 Mass. 335, 337, 84 N.E. 461, 462 (1908).

The provision of Rule 78 calling for "brief written statements of reasons in support and opposition" is similar to the requirement of Super.Ct.Rule 46 and S.J.C.Rule 2:30 that matters of fact pertinent to decision on a motion be placed before the court by affidavit or other signed statement.

Rule 79: Books and Records Kept by the Clerk and Entries Therein

(a) Civil Docket. The clerk shall keep the civil docket and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) Indices; Calendars. Suitable indices of the civil docket shall be kept by the clerk according to law under the direction of the court.

(c) Other Books and Records of the Clerk. The clerk shall also keep such other books and records as may be required by law or by direction of the court.

(d) Land Court. In the Land Court, the clerk may assign to actions for registration and confirmation, actions for tax liens, and miscellaneous other actions, separate dockets, each having consecutive file numbers, designated respectively, "Registration and Confirmation," "Tax Lien," and "Miscellaneous."

Amended December 13, 1981, effective January 1, 1982.

Reporter's Notes (1996): With the merger of the District Court rules into the Mass.R.Civ.P., a minor difference which had existed between Mass.R.Civ.P. 79 and Dist./Mun.Cts.R.Civ.P. 79 (last sentence of Rule 79(a) dealing with jury trial) has been eliminated.

Reporter's Notes (1973): Rule 79 is substantially the same as the cognate Federal Rule. It follows prior Massachusetts practice.

Rule 80: Stenographic Report or Transcript

(a) Courts Other Than District Court: Evidence in Subsequent Trial. Whenever the testimony of a witness at a trial or hearing which was officially stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

(b) Courts Other Than District Court: Part of Record on Appeal. A transcript, duly certified by the person officially reporting the testimony, shall be considered part of the record on appeal. The trial court need not appoint said person a commissioner to report the evidence.

(c) District Court: Stenographers. The appointment of stenographers in District Court proceedings shall be in accordance with the applicable statute. Whenever the testimony of a witness at a trial or hearing which was officially stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony. Subject to the discretion of the court, parties may be permitted to record stenographically the proceedings in civil actions at their own expense.

(d) District Court: Sound Recording Devices. The use of sound recording devices to record civil proceedings shall be governed by Rule 114 of the District/Municipal Courts Supplemental Rules of Civil Procedure.

Amended May 3, 1996, effective July 1, 1996; amended November 28, 2007, effective March 1, 2008.

Reporter's Notes (2008): Rule 80(c), dealing with stenographic reports in the District Court, has been amended in light of the following language in the statewide one-trial law (see G.L. c. 218, s. 19B(d)):

(d) The justice presiding at the jury of 6 session may, upon the request of a party, appoint a stenographer; provided, however, that where the party claims indigency, the

appointment is determined to be reasonably necessary in accordance with chapter 261; and provided, further, that the court electronic recording system is not available or not properly functioning....The request for the appointment of a stenographer to preserve the testimony at a trial shall be given to the clerk of the court by a party, in writing, no later than 48 hours before the proceeding for which the stenographer has been requested....The original recording of proceedings in a district court or in the Boston municipal court made with a recording device under the exclusive control of the court shall be the official record of the proceedings....

Reporter's Notes (1996): New sections (c) and (d) have been added to Rule 80 as result of the merger of the District Court rules into the Mass.R.Civ.P. and sections (a) and (b) have been retitled. As amended, Rule 80(a) and (b) now are applicable in all courts other than the District Court. Rule 80(c) adopts for District Court proceedings the provisions contained in now-repealed Rule 80(a) of the Dist./Mun.Cts.R.Civ.P., while Rule 80(d) adopts for District Court proceedings the provisions of Rule 80(b) of the Dist./Mun.Cts.R.Civ.P. The "Comments" to now-repealed Rule 80 of the Dist./Mun.Cts.R.Civ.P. explain the significance of the different provisions for District Court proceedings:

This rule totally rewrites Rule 80 of the MRCP. Since no "official" stenographers are used in the District Courts, paragraph (a) [now (c)] has been revised merely to allow the use of stenographers. The use to which the resulting record may be put is not dealt with by this rule. The swearing of the stenographer may be added merely to formalize the procedure.

Paragraph (b) [now (d)] has dropped the MRCP discussion of how the record may be proved. Instead, paragraph (b) [now (d)] of this rule deals with the use of mechanical sound recording devices, and does so merely by referring to Rule 114 of the District/Municipal Courts Supplemental Rules of Civil Procedure which covers the topic.

Reporter's Notes (1973): Rule 80(a) is similar both in wording and import to G.L. c. 233, § 80 and G.L. c. 221, § 91C. It aims to abolish the requirement set forth in G.L. c. 214, § 24 and Super.Ct.Rule 76 (applicable to equity cases) that in order to make the report of the evidence available on appeal to the full bench, the court must formally appoint the stenographer a commissioner to report the evidence. See Thayer Company v. Binnall, 326 Mass. 467, 482-483, 95 N.E.2d 193, 202-203 (1950); Price v. Price, 348 Mass. 663, 665, 204 N.E.2d 902, 904 (1965).

Rule 81: Applicability of Rules

(a) Applicability in General.

(1) Courts Other Than District Court. These rules apply to all civil proceedings in courts whose proceedings they govern except:

1. proceedings pertaining to the writ of habeas corpus;

2. proceedings pertaining to naturalization;

3. proceedings pertaining to the disciplining of an attorney;

4. proceedings pertaining to juvenile delinquency;

5. proceedings pertaining to contested elections;

6. proceedings pertaining to dissolution of corporations and distribution of their assets;

7. proceedings pertaining to summary process, small claims, and supplementary process;

8. proceedings pertaining to the adjudication, commitment and release of sexually dangerous persons;

9. proceedings for divorce or for the annulment or affirmation of marriage; and

10. proceedings to foreclose any mortgage on real estate brought in compliance with the "Servicemembers Civil Relief Act," as set forth in 50 U.S.C. App. 501 et seq.

(2) District Court. These rules apply to all civil proceedings involved in cases traditionally considered tort, contract, replevin, or equity actions, except small claims actions.

(3) In respects not governed by statute, or in the case of the District Court not governed by other District Court rules, the practice in civil proceedings to which these rules do not apply shall follow the course of the common law, as near to these rules as may be, except that depositions shall not be taken, nor interrogatories served, save by order of the court on motion, with notice, for good cause shown.

(b) Writs Abolished. The following writs are abolished: audita querela; certiorari; entry; error; mandamus; prohibition; quo warranto; review; and scire facias. In any action seeking relief formerly obtainable under any such writ, procedure shall follow these rules.

(c) Superior Court: Trial of Framed Jury Issues. These rules govern the trial of any issues framed in another court for trial in the Superior Court; but nothing herein contained shall authorize the use of discovery procedures contained in these rules, except as a justice of the Superior Court, on motion with notice, may allow for good cause shown.

(d) Terminology in Statutes. In applying these rules to any proceedings to which they apply, the terminology of any statute which also applies shall, if inconsistent with these rules, be taken to mean the analogous device or procedure proper under these rules.

(e) Procedure Not Specifically Prescribed. When no procedure is specifically prescribed, the court shall proceed in any lawful manner not inconsistent with the Constitution of this Commonwealth, these rules, or any applicable statute.

(f) Superior Court: Actions Removed, Transferred or Appealed from Another Court. Except as otherwise provided in subdivision (a) of this rule, these rules apply to civil actions removed,

transferred or appealed to the Superior Court from any other court. Repleading is not necessary unless a justice of the Superior Court so orders. If the defendant has not answered prior to removal or transfer, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleadings, then filed, or within 5 days after the filing of the removal or transfer papers, whichever period is longest.

(g) Actions Transferred or Remanded to District Court. In any action commenced in the Superior Court and transferred to a district court or the Boston Municipal Court, or in any action remanded to either such court after removal to the Superior Court, the rules for the time being in force in the district court or the Boston Municipal Court shall control all proceedings subsequent to the filing of the order for transfer or remand; but all proceedings in the Superior Court shall be governed by these rules.

Amended June 27, 1974, effective July 1, 1974; amended effective Feb. 24, 1975; amended Jan. 6, 1995, effective Feb. 1, 1995; May 3, 1996, effective July 1, 1996; November 28, 2007, effective March 1, 2008.

Reporter's Notes (2008): Unrelated to the statewide one-trial system, the reference in item 10 of Rule 81(a)(1) is amended to delete the reference to the "Soldiers' and Sailors' Civil Relief Act," which was renamed as the "Servicemembers Civil Relief Act" and updated by Congress in 2003.

Reporter's Notes (1996): A number of technical changes to Rule 81 have been made as result of the merger of the Dist./Mun.Cts.R.Civ.P. into the Mass.R.Civ.P. in 1996. These changes essentially retain the respective versions of Rule 81 that had existed in the two sets of rules prior to the merger.

Rule 81(a) has been subdivided into new subsections (1), (2), and (3).

Subsection (1) of Rule 81(a) is applicable to all courts other than the District Court, and is identical to the pre-1996 version of Rule 81(a) of the Mass.R.Civ.P., with the exception of the last paragraph of Mass.R.Civ.P. 81(a) as it existed prior to the merger. Thus, in all courts governed by the rules other than the District Court, the Mass.R.Civ.P. apply in all civil proceedings except for the ten types of proceedings specifically listed.

Subsection (2) of Rule 81(a) is applicable to the District Court and the Boston Municipal Court, and is identical to the premerger language that had been contained in the first paragraph of Rule 81(a) of the Dist./Mun.Cts.R.Civ.P. Thus, the "merged" set of rules "apply to all civil proceedings involved in [District Court] cases traditionally considered tort, contract, replevin, or equity actions, except small claims actions." Small claims actions are specifically mentioned because they otherwise could be deemed to come within the language of "cases traditionally considered" as tort or contract. The number of District Court proceedings to which the rules are inapplicable is sufficiently large such

that a comprehensive listing of such exceptions (as occurs in Rule 81(a)(1) for courts other than the District Court) would be difficult, and in all likelihood, incomplete. The difference in approach between Rule 81(a)(1) and (2), therefore, should not be taken to signify that there has been any change in applicability of the civil rules in District Court proceedings as result of the merger of the two sets of rules in 1996. The following rationale for the different approach to setting forth the applicability of the rules in District Court proceedings, as explained in the "Comments" to now-repealed Rule 81 of the Dist./Mun.Cts.R.Civ.P., is still apt:

Several significant changes from Rule 81 of the MRCP have been made in this rule. First, it is stated that these rules apply to proceedings in cases traditionally considered tort, contract, replevin, or equity actions. Small claims actions, expressly excluded from coverage under these rules, are governed by Rules 170-185 of the District/Municipal Courts Supplemental Rules of Civil Procedure. The reference to "tradition" is in deference to the fact that under these rules there are no longer any separate "causes of action." (See Rule 2 and accompanying comments.) No attempt is made to list the many other District Court civil proceedings to which these rules do not apply, such as those involving compensation to victims of violent crime, repossession hearings, summary process, supplementary procedure, hearings on denials of gun permits, civil commitments, etc. It should be noted that this rule does not enlarge District Court jurisdiction; the only equity actions covered by these rules are the few which the District Courts have the statutory power to hear and decide.

Some of the proceedings mentioned in the "Comments" quoted above are now governed by other rules. Some examples follow. Summary process actions are governed by the Uniform Summary Process Rules (Trial Court Rule I). Small claims actions are no longer governed by the District/Municipal Courts Supplemental Rules of Civil Procedure, but rather by the Uniform Small Claims Rules, Trial Court Rule III. Proceedings regarding compensation to victims of violent crime are governed by Rules 150 and 151 of the District/Municipal Courts Supplemental Rules of Civil Procedure.

Subsection (3) of Rule 81(a) contains the guidelines concerning procedure in cases where the rules are inapplicable and combines into one paragraph the essential aspects of what had been contained in the last paragraph of Mass.R.Civ.P. 81(a) and Dist./Mun.Cts.R.Civ.P. 81(a).

The only change to Rule 81(c) is contained in the title to the section. The addition of the reference to the Superior Court in the title is intended to make clear that Rule 81(c) is applicable only in the Superior Court.

Likewise, the title to Rule 81(f) has been changed to make clear that Rule 81(f) is applicable only in the Superior Court.

Reporter's Notes (1995): The amendment to Rule 81(f) makes clear that the Rules of Civil Procedure are not intended to apply to actions removed, transferred or appealed to the Superior Court and involving the types of proceedings listed in Rule 81(a). For example, where a petition for dissolution of a corporation is filed directly in the Supreme Judicial Court (see G.L. c. 156B, § 99) and thereafter transferred by the Court to the Superior Court (pursuant to G.L. c. 211, § 4A), proceedings in the Superior Court would not be governed by the Massachusetts Rules of Civil Procedure.

Reporter's Notes (1988): Rule 81(a)(7) excepts, inter alia, "proceedings pertaining to summary process" from the application of the Massachusetts Rules of Civil Procedure. However, the bar should be aware that Uniform Summary Process Rule 1 states, in part, that "[p]rocedures in such actions that are not prescribed by these rules shall be governed by the Massachusetts Rules of Civil Procedure insofar as the latter are not inconsistent with . . ." the Uniform Summary Process Rules. Stated another way, the Uniform Summary Process Rules have incorporated by reference the Massachusetts Rules of Civil Procedure to be used in a residuary capacity when they are not "inconsistent" with the Uniform Summary Process Rules or "with applicable statutory law or with the jurisdiction of the particular court in which they would be applied." Uniform Summary Process Rule 1 should be applied as written. It is not unusual in law for one set of rules (in this instance, the Massachusetts Rules of Civil Procedure) that do not by their own provisions apply in a situation to be incorporated by reference by another set of rules (in this instance, the Uniform Summary Process Rules). For example, federal law often incorporates aspects of state law, and contracts often incorporate a body of law from elsewhere.

Reporter's Notes (1975): Real estate mortgage foreclosures brought in compliance with the Soldiers and Sailors Civil Relief Act, Acts 1943, c. 57, §§ 1-3, as amended by Acts, c. 120, § 1 (not a part of the codified General Laws, but printed following M.G.L.A., c. 244, § 14) have presented a problem. The Act prescribes a distinct procedure, well-suited for the purpose, governing foreclosures. Attempts to fit this integrated arrangement into the Rules format since July 1, 1974, caused considerable difficulty to bench, bar, and clerks. Rather than press the Procrustean effort, the entire matter of real estate mortgage foreclosures complaint to the Act has been removed from the Rules, by addition of Rule 81(a)(10). Because the difficulty proceeds from the language of the Act, no other mortgage foreclosures have been similarly treated. Thus whenever a real estate mortgage foreclosure does not fall within the Act, the Rules will continue to govern.

Reporter's Notes (1973): Rule 81, based partly on the analogous Federal Rule, treats various questions of applicability.

Rule 81(a) exempts seven types of proceedings, none of which would be appropriately governed by the general civil rules. By proviso, however, Rule 81(a) commands

adherence to these rules, unless statutorily contradicted. Even so, no depositions may be had nor interrogatories served unless the court approves.

Rule 81(b) abolishes a series of venerable, and in many instances, arcane, writs. Burial of these antiques, however, does not mean elimination of the relief they afforded. It does mean that an application for such relief will henceforth be commenced like any other civil action under these rules, viz., by complaint and summons, with the former containing a prayer for the appropriate relief.

Rule 81(c) makes clear that if the Probate Court, for example, frames jury issues for trial in the Superior Court, G.L. c. 215, § 16, trial in the Superior Court will accord with these rules; but unlimited discovery will not automatically ensue, unless, of course, these rules controlled the initial Probate Court proceedings (see Rule 1).

Rule 81(d) covers cases in which an applicable statute uses terminology which, although analogous to appropriate language of these rules, departs from it somewhat. The rule makes clear that the intent of the statutory wording should be effectuated through the comparable language of the rules.

Rule 81(e) provides a safety valve for those rare instances in which no procedure seems authorized by statute, common law, or these rules. It is not calculated to permit wholesale judicial procedural innovation; rather, it is designed to guide bench and bar through unforeseeable future thickets.

Rule 81(f), based on Federal Rule 81(c), deals with cases which have been brought from a district court to the Superior Court for trial (removed cases), or re-trial (appealed cases). It makes clear that any pleadings previously filed in the court below need not be redrafted to accord with these rules. In removed cases, G.L. c. 231, § 104, the papers, including bond, must be filed in such a short time after commencement of the action that the defendant may not have previously filed his answer. If he has not, then he must do so in accordance with a fairly liberal timetable set out in Rule 81(f). The rule also requires the defendant promptly to exercise his right to demand a jury trial; because that right is usually the reason for the removal anyway, this requirement should not cause much difficulty. It should be noted that in a removed case, the plaintiff, too, has the right to demand a jury trial, G.L. c. 231, § 103; Rule 81(f) also governs his exercise of the right.

Rule 81(g) deals with the converse of the Rule 81(f) situation. Here, the case has either been commenced in the Superior Court or removed there, but has, for lack of sufficient amount in controversy, been transferred to the appropriate district court (if it was commenced in the Superior Court) or remanded there (if it had originally been commenced in the district court and then removed to the Superior Court), G.L. c. 231, § 102c. In either event, Rule 81(g) makes clear that when the case goes to the district court, that court's rules apply; but while it is in the Superior Court, the instant rules control the proceedings.

Rule 82: Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the courts or the venue of actions therein.

Effective date July 1, 1974.

Reporter's Notes (1973): Rule 82, taken with minor changes from Federal Rule 82, makes clear that the new Rules are entirely procedural, and that they have left unchanged the various statutes setting out jurisdiction of the courts and venue of actions.

Rule 83: Supplemental Rules

Any court whose procedure is regulated in whole or in part by these rules may from time to time make and amend supplemental rules, or continue in force existing rules, governing its procedure not inconsistent with these rules. In instances not provided for by rule, each said court may regulate its practice in a manner not inconsistent with these rules and the said supplemental rules.

Adopted June 27, 1974, effective July 1, 1974.

Reporter's Notes (1996): Rule 83, which had been "reserved" in the Dist./Mun.Cts.R.Civ.P., is now applicable in the District Court as result of the merger of the District Court civil rules into the Mass.R.Civ.P. in 1996.

Reporter's Notes (1994): This rule permits the promulgation of supplemental rules by courts whose procedure is governed by these rules. However, the provisions of the Massachusetts Rules of Civil Procedure will prevail whenever there is inconsistency between them and supplemental rules or standing orders. See Sullivan v. Iantosca, 409 Mass. 796, 801 (1991).

It should be noted, however, that a supplemental rule containing a time period shorter than that set out in the rules of civil procedure is not necessarily inconsistent with the rules of civil procedure. For example, where a Superior Court rule required that affidavits in opposition to a motion for summary judgment be filed within ten days after service of the summary judgment motion, the Appeals Court noted that "[t]rial court rules 'more demanding than the requirements of Rule 56 . . . are not necessarily inconsistent with the general provisions' in the rule [allowing the filing of counter-affidavits prior to the hearing day]." Ruggiero v. Costa, 28 Mass.App.Ct. 967, 968 (1990), citing 10A Wright & Miller, Federal Practice and Procedure § 2719, at 13 (1983). See also 12 Wright & Miller, Federal Practice and Procedure § 3153 (1973) (citing federal cases interpreting similar language in Federal Rule 83).

Rule 84: Forms

Effective January 1, 2017, this rule is repealed and the related Appendix of Forms deleted.

~~The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate. Unless these rules or the supplemental rules of the Land Court, adopted under Rule 83, otherwise indicate, parties in the Land Court must use forms specified in the Land Court's supplemental rules.~~

Amended Dec. 13, 1981, effective Jan. 1, 1982. Repealed Novemeber 30, 2016, effective January 1, 2017.

Reporter's Notes (1973): The Reporters have prepared and appended to the Rules a comprehensive set of forms based on an amalgam of the Federal forms (adopted for State practice) and the Massachusetts forms contained in G.L. c. 231, § 147.

Rule 85: Title

These rules may be known and cited as the Massachusetts Rules of Civil Procedure. (Mass.R.Civ.P.)

Effective July 1, 1974.

Reporter's Notes (1996): With the merger of the District/Municipal Courts Rules of Civil Procedure into the Massachusetts Rules of Civil Procedure in 1996, the former title has been eliminated. The Mass.R.Civ.P. now also apply in the District Court and in the Boston Municipal Court.

Reporter's Notes (1973): This tracks Federal Rule 85.