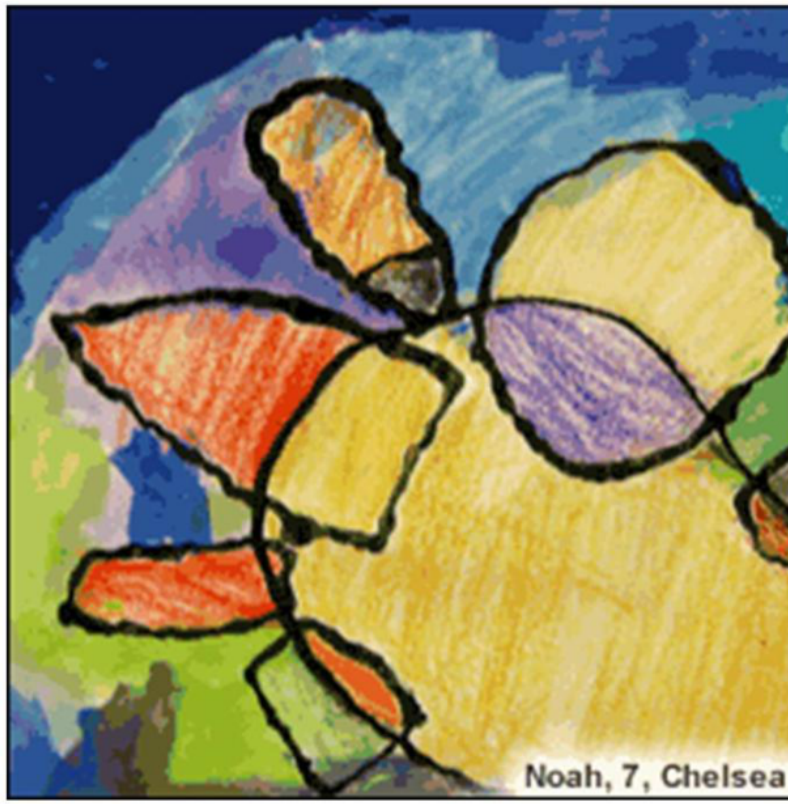
Massachusetts Rules of Domestic Relations Procedure



Massachusetts Trial Court Law Libraries

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Including amendments effective May 1, 2010

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Print sources for rules:

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

Table of Contents

I. Scope of Rules--One Form of Action

Rule 1: Scope of Rules

These rules govern the procedure in the Probate and Family Court Department in all proceedings for divorce, separate support, and custody of minor children, annulment or affirmation of marriage, an action for spousal and/or child support, an action to determine paternity and/or support for a child born out of wedlock, modification thereof, contempt and abuse prevention as enumerated in General Laws, Chapters 207, 208, 209, 209A, 209C, 215 and 209D. They shall be construed to secure the just, speedy and inexpensive determination of every action they govern.

Amended effective January 1, 1976; amended June 25, 1979, effective July 19, 1979; amended July 31, 1986, effective July 22, 1986; amended January 6, 1995, effective February 1, 1995; amended effective July 26, 1995.

Rule 2: One Form of Action

There shall be one form of action to be known as "civil action". (Identical to Mass. R. Civ. P. 2).

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

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. (Identical to Mass.R.Civ.P. Rule 3).

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). (Identical to Mass.R.Civ.P. Rule 4(a).)

(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. (Identical to Mass.R.Civ.P. Rule 4(b).)

(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 disinterested person; 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) The defendant, whether within or without the Commonwealth, may accept personal service by written

endorsement of his duly notarized acceptance of service on the summons or other process. In the event that service is not so accepted, service shall be made as set forth hereafter:

(2) Upon an individual by delivering a copy of the summons and of the complaint to him personally.

In complaints seeking establishment of paternity or for support of a child born out of wedlock, complaints for support of a spouse or child under Chapter 209, § 32F, for actions under Chapter 209D, for contempt and complaints for modification only, upon an individual:

(i) by delivering a copy of the summons and complaint to him personally, or

(ii) by leaving a copy of the summons and complaint at his last and usual place of abode and by mailing copies thereof to the defendant. Notice under this subsection shall be proved by affidavit containing a particular statement thereof.

(3) If the person authorized to serve process makes return that after diligent search he cannot find the defendant, or if it appears that a defendant resides outside of the Commonwealth or is of parts unknown, the court may on application of the plaintiff issue an order of notice in the manner and form prescribed by law.

(4) If personal service shall not be made as aforesaid, such notice in the form ordered by the court shall be served by publishing a copy of the said notice once in some newspaper designated by the Register or the court and by mailing a copy of such notice by registered or certified mail, if

practicable, to the defendant at his last known address. The defendant shall file his answer or other responsive pleading within the time periods allowed under these rules computed as if the date of publication were the date on which personal service was made.

(5) Service of publication and mailing shall be proved by affidavit containing a particular statement thereof, accompanied by a copy of the advertisement (or tear sheet) of the newspaper containing the publication and, if practicable, by the return receipt showing receipt of a copy sent by registered or certified mail.

(6) The court shall require proof of actual notice when practicable. If such notice is not shown to have been received by the defendant, the complaint shall not be assigned for hearing until the expiration of three months after the publication date, date of service at a last and usual place of abode, or date of a mailing to the last known address of the defendant if such service has been ordered by the court. Nothing in this rule shall prevent hearing of a motion for temporary orders or issuance of temporary orders prior to the expiration of three months, provided notice of the motion and hearing has been mailed to the defendant's last and usual place of abode in accordance with Rules 5 and 6.

(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. (Identical to Mass.R.Civ.P.Rule 4(e).)

(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. The person making return of service shall state in his return of service that a copy of the summons and complaint was delivered by him in hand to the defendant and shall further state the date on which and the place where such service was made. 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. (Identical to Mass.R.Civ.P. 4(g).)

(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. (Identical to Mass.R.Civ.P. 4(h).)

(i) Deleted.

(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. (Identical to Mass.R.Civ.P. 4(j).)

Amended effective January 1, 1976; amended effective March 8, 1976; amended January 16, 1979, effective February 12, 1979; amended November 16, 1979, effective December 17, 1979; amended effective January 1, 1983; amended June 27, 1983, effective July 1, 1983; amended July 18, 1988, effective August 1, 1988; amended August 5, 1992, effective September 1, 1992; amended January 6, 1995, effective February 1, 1995; amended effective July 26, 1995; amended October 10, 1997, effective December 1, 1997; amended June 5, 2003, effective September 2, 2003; amended April 1, 2009, effective May 1, 2009.

Reporter's Notes

Reporter's Notes (2009) Rule 4(d)(4) was amended to reduce the number of times notice must be published. This change is consistent with the probate rule requirement and will be more cost effective for litigants.
Reporter's Notes (2003) Rule 4(d)(6) was amended to clarify the misunderstanding that the court is prohibited from entering a temporary order prior to the expiration of three (3) months if there is not proof of actual notice.
Reporter's Notes (1997) Rule 4(d)(7) was deleted in order to eliminate the requirement of an identifying witness in service of process.

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. (Identical to Mass.R.Civ.P 4.1(a))

(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. (Identical to Mass.R.Civ.P 4.1(b))

(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. (Identical to Mass.R.Civ.P 4.1(c))

(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. (Identical to Mass.R.Civ.P 4.1(d))

(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. (Identical to Mass.R.Civ.P 4.1(e))

(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 11, shall be supported by affidavit or affidavits meeting the requirements set forth in subdivision (h) of this rule. (Identical to Mass.R.Civ.P 4.1(f))

(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. (Identical to Mass.R.Civ.P 4.1(g))

(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. (Identical to Mass.R.Civ.P 4.1(h))

(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. (Identical to Mass.R.Civ.P 4.1(i))

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. (Identical to Mass.R.Civ.P 4.2(a))

(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. (Identical to Mass.R.Civ.P 4.2(b))

(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). Except as 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. (Identical to Mass.R.Civ.P 4.2(c))

(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. (Identical to Mass.R.Civ.P 4.2(d))

(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. (Identical to Mass.R.Civ.P 4.2(e))

(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. (Identical to Mass.R.Civ.P 4.2(f))

(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). (Identical to Mass.R.Civ.P 4.2(g))

(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. (Identical to Mass.R.Civ.P 4.2(h))

(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. (Identical to Mass.R.Civ.P 4.2(i))

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. (Identical to Mass.R.Civ.P 4.3(a))

(b) Deleted.

(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. (Identical to Mass.R.Civ.P 4.3(c))

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. (Identical to Mass.R.Civ.P. 5(a))

(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 register of probate. 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. If notice of a hearing is given by service in hand delivered after 4 p.m., an additional day shall be added for purposes of computation of time under Rule 6(c). The time when the in hand service was made shall be reflected on the Certificate of Service.

(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. (Identical to Mass.R.Civ.P. 5(c))

(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. (Identical to Mass.R.Civ.P. 5(d))

(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. (Identical to Mass.R.Civ.P. 5(e))

(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. (Identical to Mass.R.Civ.P. 5(f))

(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. (Identical to Mass.R.Civ.P. 5(g))

Amended June 8, 1989, effective July 1, 1989; amended October 10,

1997, effective
December 1, 1997; amended June 5, 2003, effective September 2, 2003.

Reporter's notes

Reporter's Notes (2003) The amendment to Rule 5(d) is in response to the amendment to Mass.R.Civ.P. Rule 5(d) Service and Filing of Pleadings and Other Papers. The amendment is intended to relieve the parties and court personnel of the burdens involved with the filing of interrogatories and answers with the court.

Reporter's Notes (1997) The amendment to Rule 5(b) allows for an additional day to be added for the purpose of computation of time if service is delivered in hand after 4 p.m. The amendment also provides that if service is made by in hand service it will be reflected on the Certificate of Service.

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. (Identical to Mass.R.Civ.P. 6(a)

(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. (Identical to Mass.R.Civ.P. 6(b))

(c) **For Motions-Affidavits-Proposed Orders.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than seven (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 be made on ex parte application

when an emergency justifies the same. An application for ex parte relief from the seven (7) day notice requirement shall be by motion and supported by affidavit setting forth the nature of the emergency. On allowance of the motion, the court shall make a written finding that the emergency exists and setting forth the nature of the emergency. Whenever a motion is supported by a memorandum or affidavit, the memorandum or affidavit shall be served with the motion; and except as provided in Rule 59(c), opposing memoranda or affidavits must be served not later than one (1) business day before the hearing, unless the court permits them to be served at some other time. Every motion shall be accompanied by a proposed order, which shall be served with the motion. The proposed order shall set forth in detailed itemized paragraphs the relief sought from the court. The proposed order should not be docketed or included in the permanent file if the order is not adopted by the court and may be destroyed after the hearing on the motion. The service and content of all motions, affidavits, and supporting papers shall be subject to the sanctions of Rule 11 of these rules.

(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. (Identical to the Mass.R.Civ.P. 6(d))

Amended October 10, 1997, effective December 1, 1997; amended October 27, 1999,
effective January 1, 2000; amended June 5, 2003, effective September 2, 2003.

Reporter's Notes

Reporter's Notes (2003) The amendment to Rule 6(c) requires that any pleadings, whether an affidavit or a memorandum in support or in opposition to a motion, be served prior to the time fixed for hearing on the motion.

Reporter's Notes (2000) Rule 6(c) requires every motion to be accompanied by a proposed order. The amendment to rule 6(c) makes clear that the proposed order should not be docketed or included in the permanent case file and may be destroyed after a hearing on the motion.

Reporter's Notes (1997) This amendment to Rule 6(c) changes the time requirements for service of a motion from three (3) to seven (7) days, unless it is a motion that may be heard ex parte. All ex parte motions must be accompanied by an affidavit setting forth the nature of the emergency. If the motion is

allowed, the court must make written findings that an emergency exists and set forth the nature of the emergency.

The amendment also provides that if a motion is supported by an affidavit it must be served with the motion, except as provided in Rule 59(c). The service of opposing affidavits is no longer optional. If a motion is accompanied by an affidavit, then an opposing affidavit must also be served. The amendment to the rule changes the time requirement for service of the opposing affidavit from not later than one (1) day before the hearing, to not later than two (2) full business days before the hearing.

All motions must now be accompanied by a proposed order which sets forth, in itemized detail, the relief sought from the court. In addition, Rule 6(c) explicitly states that the service and content of motions are subject to the sanctions of Rule 11.

I. Pleadings and Motions

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. (Identical to Mass.R.Civ.P. 7(a))

(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. (Identical to Mass.R.Civ.P. 7(b))

(c) Demurrers, Pleas, Etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used. (Identical to Mass.R.Civ.P. 7(c))

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. (Identical to Mass.R.Civ.P. 8(a))

(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. (Identical to Mass.R.Civ.P. 8(b))

(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. (Identical to Mass.R.Civ.P. 8(c))

(d) Deleted.

(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. (Identical to Mass.R.Civ.P. 8(e))

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice. (Identical to Mass.R.Civ.P. 8(f))

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. (Identical to Mass.R.Civ.P. 9(a))

(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. (Identical to Mass.R.Civ.P. 9(b))

(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. (Identical to Mass.R.Civ.P. 9(c))

(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. (Identical to Mass.R.Civ.P. 9(d))

(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. (Identical to Mass.R.Civ.P. 9(e))

(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. (Identical to Mass.R.Civ.P. 9(f))

(g) **Special Damage.** When items of special damage are claimed, they shall be specifically stated. (Identical to Mass.R.Civ.P. 9(g))

Rule 10: Form of Pleadings

(Identical to Mass.R.Civ.P. 10)

(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 January 24, 1978, effective February 21, 1978; amended March 5, 2010, effective May 1, 2010.

Reporter's Notes

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).

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. (Identical to Mass.R.Civ.P. 11(a))

(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. (Identical to Mass.R.Civ.P. 11(b))

(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. (Identical to Mass.R.Civ.P. 11(c))

(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. (Identical to Mass.R.Civ.P. 11(d))

(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. (Identical to Mass.R.Civ.P. 11(e))

Amended March 5, 2010, effective May 1, 2010.

Reporter's Notes

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.

Rule 12: Defenses and Objections--When and How Presented--By Pleading or Motion

(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. (Identical to

Mass.R.Civ.P. 12(a))

(a) **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.

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. (Identical to Mass.R.Civ.P. 12(b))

(c) **Deleted.**

(d) **Preliminary Hearings.** The defenses specifically enumerated (1)-(9) in subdivision (b) of this rule, whether made in a pleading or by motion 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 other 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. Identical to Mass.R.Civ.P. 12(e)

(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. (Identical to Mass.R.Civ.P. 12(f))

(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.

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, or pendency of a prior action 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) Deleted.

(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.

Rule 13: Counterclaim and Cross-Complaint

(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 other than the county 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.

(b) **Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party. (Identical to Mass.R.Civ.P. 13(b))

(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. (Identical to Mass.R.Civ.P. 13(c))

(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. (Identical to Mass.R.Civ.P. 13(d))

(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. (Identical to Mass.R.Civ.P. 13(e))

(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. (Identical to Mass.R.Civ.P. 13(f))

(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. (Identical to Mass.R.Civ.P. 13(g))

(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.

(Identical to Mass.R.Civ.P. 13(h))

(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. (Identical to Mass.R.Civ.P. 13(i))

(j) **Cross-Complaint.** In a contested action for divorce if the defendant upon payment of the proper entry fee and at any time prior to the conclusion of the hearing shall cause to be entered his or her cross-complaint for divorce, the court shall allow the entry of said cross-complaint after giving of such notice or service to the new defendant as the court, in its discretion, shall order.

Amended January 16, 1979, effective February 12, 1979.

Rule 14 (Deleted)

Rule 15: Amended and Supplemental Pleadings

(Identical to Mass.R.Civ.P. 15)

(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.

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 advisability of a preliminary reference of issues to a master;
6. The possibility of settlement;
7. Agreement as to damages; and
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.

I. Parties

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. An executor, administrator, 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. (Identical to Mass.R.Civ.P. 17(a).)

(b) Infants or incompetent 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 an 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 may 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 may make such other order as it deems proper for the protection of the infant or incompetent person, or an incapacitated person as defined in G.L. c.190B.

Amended June 24, 2009, effective July 1, 2009; amended November 30, 2009, effective December 1, 2009.

Rule 18 (Deleted)

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. (Identical to Mass.R.Civ.P. 19(a))

(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. (Identical to Mass.R.Civ.P. 19(b))

(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. (Identical to Mass.R.Civ.P. 19(c))

(d) **Deleted.**

Rules 20-23.2 (Deleted)

Rule 24: Intervention

(Identical to Mass.R.Civ.P. 24)

(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.

Rule 25: Substitution of Parties

(a) **Deleted.**

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

(c) **Deleted.**

(d) Deleted.

Amended June 24, 2009, effective July 1, 2009.

I. Depositions and Discovery

Rule 26: General Provision 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. (Identical to Mass.R.Civ.P. 26(a) (as amended January 1, 1981)).

(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: Privilege Log. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as material prepared 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.

(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 or place; (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.

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. (Identical to Mass.R.Civ.P. 26(d)).

(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. (Identical to Mass.R.Civ.P. 26(e))

(f) Format of Discovery Motions. A motion to compel (1) further responses to interrogatories, (2) answers to a request for admissions, (3) answers to questions propounded at a deposition, or (4) production of documents or tangible things shall be submitted with a separate document setting forth each separate interrogatory, item or category of items, request, question, document or tangible thing to which further response, answer or production is requested. Said separate document shall include the response given, and the factual and legal reasons that the court should compel the specific item. Materials may not be incorporated by reference in the documents accompanying the motion. If pleadings or other documents in the court file are relevant to the motion, the party relying on such pleadings or other documents shall clearly identify and summarize each relevant document in a separate paragraph in any papers submitted to the court regarding the discovery motion. The motion must include a sworn statement by the moving party setting forth the specific steps taken in an attempt to obtain the desired discovery responses. The responding party shall submit to the court and to the moving party a written statement setting forth the reasons for non-compliance and/or a denial, in whole or in part, of the allegations of the motion to compel and its supporting documentation. Said written statement shall be served not later than two (2) business days before the hearing.

(g) Mandatory Pre-Motion Conference. Prior to seeking judicial resolution of a discovery or procedural dispute, the attorneys for the affected parties or non-party witness shall confer in good faith in

person or by telephone in an effort to resolve the dispute.

(h) Certification of Discovery Motions. All discovery motions shall contain a certificate by the party filing same that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and failed. The certification shall be included in the statement required of the moving party under Rule 26(f) supra.

(i) No-Contact Order. Where there is a no-contact order in effect, the parties shall be exempted from the requirements of Rule 26(f) and (g). There shall be no requirement that they confer in order to resolve the discovery dispute.

(j) Special Master. The court, on its own motion or at the request of either party, may appoint a special master to control the extent of discovery, including the scheduling and oversight of depositions as more fully set out in **Rule 30(c)**, the time for completion of discovery and to resolve any discovery disputes which may arise during the course of the litigation.

Prior to the appointment of said special master, the court may inquire whether the parties can agree upon a special master. The court may appoint the person agreed upon or such other suitable person.

The special master shall be appointed by a written order of reference. Said order shall set the terms and conditions under which the special master is to proceed and may specify or limit the special master's powers. The fees and costs of the special master including a reasonable retainer shall be borne equally by the parties unless the special master determines that a different allocation of the fees and costs is appropriate.

Subject to the specifications and limitations stated in the order of reference, the special master has and shall exercise the power to regulate all matters before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order, including the authority to grant sanctions limited to reasonable counsel fees and/or special master fees if a party takes an unreasonable position, in accordance with the standards established pursuant to **Rule 37**.

If a party disagrees with a decision of the special master, the matter may be brought before the court. Each party and the special master shall submit proposed orders to the court. A party who has acted arbitrarily or in bad faith in bringing the matter before the court may be subject to sanctions as the court deems appropriate, including counsel fees and/or special master fees.

Amended effective September 1, 1981; amended October 10, 1997,

effective December 1, 1997; amended October 27, 1999, effective January 1, 2000; amended February 27, 2008, effective April 1, 2008.

Reporter's Notes

Reporter's Notes (2000) Rule 26(j) was added to provide for the appointment of a special master on motion of the court or on motion of either party. The special master may be appointed to control discovery including scheduling and oversight of depositions, the time for completion of discovery and to resolve any discovery disputes which may arise during the course of litigation. If a party disagrees with a decision of the special master, the matter may be brought before the court. However, if a party has acted arbitrarily or in bad faith in bringing the matter before the court, they may be subject to sanctions. The fees and costs of the special master, including a reasonable retainer, shall be borne equally by the parties unless the special master determines that a different allocation of the fees and costs is appropriate.

Reporter's Notes (1997) Rule 26 was expanded by adding section (f), (g) and (h) and (i). Section (f) of the rule sets forth the specific format for motions to compel discovery. Sections (g) and (h) requires that parties confer in an effort to resolve the discovery dispute, and then certify to the court that efforts to resolve the dispute have been tried and failed. Section (i) exempts parties from the requirement of section (g) and (h) where there is a no-contact order in effect.

Rule 27: Depositions Before Action or Pending Appeal

(Identical to Mass.R.Civ.P. 27)

(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 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).

(a) **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.

(b) **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.

Rule 28: Persons Before Whom Depositions May be Taken

(Identical to Mass.R.Civ.P. 28)

(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 October 27, 1981, effective January 1, 1982.

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.

(Identical to Mass.R.Civ.P. 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) (deleted); (iii) (deleted); (iv) there has been a hearing before a master; or (v) (deleted). The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison or a minor child 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. (Identical to Mass.R.Civ.P. 30(b)(1))

(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. (Identical to Mass.R.Civ.P. 30(b)(2))

(3) The court may for cause shown enlarge or shorten the time for taking the deposition. (Identical to Mass.R.Civ.P. 30(b)(3))

(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. (Identical to Mass.R.Civ.P. 30(b)(4) as amended January 1, 1981.)

(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.

(Identical to Mass.R.Civ.P. 30(b)(5))

(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. (Identical to Mass.R.Civ.P. 30(b)(6))

(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 a disqualification pursuant to G.L. c. 233, § 20 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).

Pursuant to Rule 26(j), a special master may be appointed to oversee the deposition practice and procedure. The court may order or the special master may decide to attend the deposition. A party may request the attendance of the special master at a deposition, if a party reasonably believes it is necessary. In addition to the powers enumerated in Rule 26(j) and subject to the specifications and limitations stated in the order of reference, the special master may decide the time, date and place for the deposition, the length of the deposition and who may be present at the deposition.

(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. (Identical to Mass.R.Civ.P. 30(d))

(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.
(Identical
to Mass.R.Civ.P. 30(e))

(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. (Identical to Mass.R.Civ.P. 30(f)(1)-(3))

(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. (Identical to Mass.R.Civ.P. 30(g))

Amended effective September 1, 1981; amended January 30, 1989, effective March 1, 1989; amended June 8, 1989, effective July 1, 1989; amended October 10, 1997, effective December 1, 1997; amended October 27, 1999, effective January 1, 2000.

Reporter's Notes

Reporter's Notes (1997) Rule 30(a) was amended to eliminate the requirement that leave of court be obtained before the taking of oral deposition in actions in which the relief sought is the custody of minor children, or the affirmance or annulment of marriage.

The amendment to Rule 30(f) makes it identical to Mass.R.Civ.P. 30(f) by including (f)(2) which requires the officer to furnish a copy of the deposition to any party or to the deponent upon payment of reasonable charges.

(2000). The purpose of the amendment to rule 30(c), modeled after the 1998 amendment to rule 30(c) of the Massachusetts Rules of Civil Procedure, 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 Mass.R.Civ.P. 30(c), it would appear that counsel could instruct a deponent not to answer a question that comes within the disqualification of G.L. c. 233, § 20, since the latter would constitute a "protection against disclosure." However, in light of the frequency in which this issue occurs in domestic relations cases, it was deemed advisable to add the Domestic Relations Rules a specific reference to this statutory disqualification.

The revised rule references Mass.R.Dom.Rel.P. 26(j) regarding the appointment of a special master to oversee the deposition practice and procedure. In addition to the powers enumerated in rule 26(j), the amendment to rule 30(c) allows for the special master to decide the time, date and place for the deposition, the length of the deposition and who may be present.

Rule 30A: Audio-Visual Depositions

(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). 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 30A(m), the provisions of rule 30A(a)-(l) shall apply to audio-visual expert witness depositions for trial.

(Identical to Mass.R.Civ.P. 30A which was effective January 1, 1981. Effective September 1, 1981.)

Adopted effective September 1, 1981.

Rule 31: Deposition of Witnesses Upon Written Questions

(Identical to Mass.R.Civ.P. 31)

(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 January 30, 1989, effective March 1, 1989; amended June 8, 1989, effective July 1, 1989.

Rule 32: Use of Depositions in Court Proceedings

(Identical to Mass.R.Civ.P. 32)

(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.

Rule 33: Interrogatories to Parties

(a) **Availability: Procedures for Use.** 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.

No party shall serve on any other party as of right more than one set

of interrogatories, unless the total number of all interrogatories in all sets combined does not exceed thirty, including interrogatories, subsidiary or incidental to, or dependent upon, other interrogatories, and however the same may be grouped or combined. The court, on a showing of good cause, or upon agreement of the parties, may allow service of additional interrogatories.

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 an 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, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve the answers and objections, if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon the defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection or other failure to answer an interrogatory. In addition, 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. All sanctions available to a party
under Rule 37 and any other sanction that the court may deem appropriate shall be available to compel compliance with this rule and such sanctions shall be ordered by the court except for good cause shown.

(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. (Identical to Mass.R.Civ.P. 33(b))

(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. (Identical to Mass.R.Civ.P. 33(c))

As amended June 5, 2003, effective September 2, 2003.

Reporter's Notes

Reporter's Notes (2003) The non-filing requirement of amended Rule 5(d)necessitated changes in the Rule 33(a) procedure by which a party who has served interrogatories seeks to have

judgment entered against a party for failure to respond to the interrogatories. Since a default judgment is not permissible under the Rules of Domestic Relations procedure, all sanctions available to a party under Rule 37 and any other sanction that the court may deem appropriate shall be available to compel compliance with this rule and such sanctions shall be ordered by the court except for good cause shown. In addition, the amendment brings the Probate and Family Court into conformity with the Rules of Civil Procedure by requiring that each answer or objection shall be preceded by the interrogatory to which it responds.

Rule 34: Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. 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. 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. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. 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.

Rule 35: Physical and Mental Examination of Persons

(Identical to Mass.R.Civ.P. 35)

(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.

Rule 36: Requests for Admission

(Identical to Mass.R.Civ.P. 36)

(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.

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 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 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 an opportunity for a 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 Where Deposition Is Taken. If a

deponent wilfully fails to be sworn or to answer a question after being directed to do so by the court in the county 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 or a person interrogated under Rule 33 wilfully 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;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the wilful failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has wilfully 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. (Identical to Mass.R.Civ.P. 37(c).)

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request of 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 wilfully 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), (C) and (D) 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.

I. Trials

Rule 38 (Deleted)

Rule 39: Trial by Jury or by the Court

(a)	**Deleted.**
(b)	**Deleted.**
(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. (Identical to Mass.R.Civ.P. 39(c))

Rule 40: Assignment of Cases for Trial: Continuances

(Identical to Mass.R.Civ.P. 40)

(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.

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 (ii) that after a judgment nisi has been entered, upon the filing of a stipulation of dismissal signed by all the parties who have appeared in the action, the same shall be presented forthwith to a judge of the Court who shall thereupon enter an order of dismissal. 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. (Identical to Mass.R.Civ.P. 41(a)(2))

(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. 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, operates as an adjudication upon the merits. (Identical to Mass.R.Civ.P. 41(b))

(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. (Identical to Mass.R.Civ.P. 41(c))

(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. (Identical to Mass.R.Civ.P. 41(d))

Amended January 24, 1978, effective February 21, 1978; amended effective June 7, 1979.

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. (Identical to Mass.R.Civ.P. 42(a))

(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.(Identical to Mass.R.Civ.P. 42(b))

Rule 43: Evidence

(a) **Form and Admissibility.** In all trials the testimony of witnesses

shall be taken orally in open court, or such other place as the judge may in his discretion determine, 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 and Examination and Cross-Examination**. A party may interrogate any unwilling or hostile witness by leading questions. A party may call 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.** 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, except that the court, when there is a stenographer appointed or when a stenographer

has been appointed, upon request shall take and report 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. (Identical to Mass.R.Civ.P. 43(d))

(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. (Identical to Mass.R.Civ.P. 43(e))

(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. (Identical to Mass.R.Civ.P. 43(f))

(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. (Identical to Mass.R.Civ.P. 43(g))

Rule 44: Proof of Official Records

(Identical to Mass.R.Civ.P. 44)

(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.

(a) **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.

(b) **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.

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. (Identical to Mass.R.Civ.P 44.1)

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 attend and give testimony at a time and place therein specified. The clerk, notary public, or justice of the peace shall issue a subpoena, or a subpoena for the production of documentary evidence, signed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but 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 books, papers, documents, or tangible things.

(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 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) Subpoena for Taking Deposition; 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.

The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by these rules, but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

A deposition subpoena upon a party which commands the production of documents or things must give the party deponent at least thirty 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.

The person to whom the subpoena is directed 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 attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued.

The party serving the subpoena may if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) Unless the court orders otherwise, a resident of this Commonwealth shall not be required to attend an examination 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. A non-resident of the Commonwealth when served with a subpoena within the Commonwealth may be required to attend 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 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 at a hearing or trial may be served at any place within the Commonwealth.

(f) 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.

Rule 46: Exceptions Unnecessary

Formal exceptions to rulings or orders of the court in cases in which a stenographer is present or a recording is made 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.

Rules 47-50 (Deleted)

Rule 51: Argument

(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. (Identical to Mass.R.Civ.P. 51(a))
(b)	**Deleted.**

Rule 52: Findings by the Court

(a) **Effect.** In actions tried upon the facts without a jury, except as provided herein for judgments entered pursuant to G.L. ch. 208, sec. 34, the court shall upon written motion made prior to final argument, providing either party or the court has requested appointment of a stenographer pursuant to Rule 202 or the trial was recorded electronically, find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58. Where the court enters judgment pursuant to G.L. ch. 208, sec. 34 it shall issue findings of fact and conclusions of law thereon within sixty (60) days of the filing of a notice of appeal. 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 except as provided in Rule 41(b)(2).

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of its findings 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) **Transcript of Proceedings Upon Request for Special Findings.** Upon a written motion under paragraph (a) of this rule, the party making such request shall order from the stenographer and file with the court the original of a transcript of such parts of the proceedings not already on file as the court may determine material to any facts essential to a determination of the case. At the time of ordering, a party shall make satisfactory arrangements with the stenographer for payment of the cost of the transcript.

Amended effective July 1, 1984; amended December 15, 1986, effective January 2, 1987.

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. (Identical to Mass.R.Civ.P 53(a))

(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 Appointment. Prior to the appointment of a master, the court may inquire whether the parties can agree upon a master. The court may appoint the person agreed upon or such other suitable person.

(3) Deleted.

(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. (Identical to Mass.R.Civ.P 53(c))

(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. (Identical to Mass.R.Civ.P 53(d))

(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. (Identical to Mass.R.Civ.P 53(e))

(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 three (3) 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.

(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 findings upon each issues that is within the order of reference and will include and clearly identify the subsidiary findings upon which each general findings 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. 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 ten (10) 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 thirty (30) 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 ten (10) 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 to 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.

Amended effective July 1, 1982; amended October 10, 1997, effective December 1, 1997.

Reporter's Notes

Reporter's Notes (1997) Rule 53(b)(2) was added which allows the court to inquire as to whether the parties can agree upon a master. The court would have the discretion to appoint the mutually agreed upon master or another suitable person.

I. Judgment

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. (Identical to Mass.R.Civ.P. 54(a))

(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. (Identical to Mass.R.Civ.P. 54(b))

(c)	**Deleted.**
(d)	**Deleted.**
(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 trial. 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. (Identical to Mass.R.Civ.P. 54(e) as amended January 1, 1981)

Amended effective September 1, 1981.

COMMENTS

Rule 54(c) (demand for judgment) and Rule 54(d) (costs) have been deleted as inapplicable to Domestic Relations practice.

Rule 54(e) was amended in 1981 to incorporate an amendment to the Massachusetts Rules of Civil Procedure by reference.

Rule 55 (Deleted)

Rule 56: Summary Judgment

(a) **Motions for Summary Judgment.** A party may move for summary judgment subsequent to the commencement of any proceeding under these rules except in actions for divorce or in actions for custody or visitation or for criminal contempt. Each motion for summary judgment shall be accompanied by a "Affidavit of Undisputed Facts" which shall enumerate discretely each of the specific material facts relied upon in support of the motion and cite the particular portions of any pleading, affidavit, deposition, answer to interrogatories, admission or other document relied upon to establish that fact. The motion shall be served at least ten (10) days before the time fixed for the hearing. The moving party shall be responsible for filing with the Court all evidentiary documents cited in the moving papers. The motion for summary judgment shall be denied if the moving party fails to file and serve the affidavit required by this paragraph.

(b) **Opposition.** Any party opposing a motion for summary judgment shall file and serve no later than three (3) days before the time fixed for the hearing, unless the court otherwise orders, an affidavit using the same paragraph numbers as in the "Affidavit of

Undisputed Facts" and admit those facts which are undisputed and deny those which are disputed, including with each denial a citation to the particular portions of any pleading, affidavit, deposition, answers to interrogatories, admission or other document relied upon in support of the denial. The opposing party may also file a concise "Affidavit of Disputed Facts," and the source thereof in the record, of all additional material facts as to which there is a genuine issue precluding summary judgment. The opposing party shall be responsible for the filing with the court of all evidentiary documents cited in the opposing papers. If a need for discovery is asserted as a basis for denial of the motion, the party opposing the motion shall provide a specification of the particular facts on which discovery is to be had or the issues on which discovery is necessary.

(c) **Stipulated Facts.** All interested parties may jointly file a stipulation setting forth a statement of stipulated facts to which all interested parties agree. As to any stipulated facts, the parties so stipulating may state that their stipulations are entered into only for the purposes of the motion for summary judgment and are not intended to be otherwise binding.

(1) In any pending motion for summary judgment, the assigned judge may order the parties to meet, confer and submit, on or before a date set by the assigned judge, a joint statement of undisputed facts.

(d) **Deleted.**

(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 any affidavits 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 filing of the affidavit caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) **Judgment.** 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. Summary judgment, when appropriate, may be rendered against the moving party.

Adopted October 10, 1997, effective December 1, 1997; amended October 27, 1999, effective January 1, 2000; amended June 5, 2003, effective September 2, 2003; amended April 1, 2009, effective May 1, 2009.

Reporter's Notes

Reporter's Notes (2009) The amendment will allow for summary judgment in all cases exclusive of divorce actions, actions for custody or visitation or actions for criminal contempt.

Reporter's Notes (2003) The amendment to Rule 56(h) deletes the phrase "on file" from the first sentence in recognition that discovery documents are generally no longer filed separately with the court. See Rule 5(d)(2). The previous reference to admissions has also been replaced by a reference to "responses to requests for admission under Rule 36."

Reporter's Notes (2000) As originally promulgated, rule 56(b) did not require the party opposing a motion for summary judgment to file an affidavit. Rather, it required the opposing party to reproduce the
itemized facts contained in the "Affidavit of Undisputed Facts" and admit those facts which were undisputed and deny those which were disputed. The amendment to rule 56(b) rectifies this problem by requiring the party opposing the motion for summary judgment to file and serve, no later than three (3) days before the time fixed for the hearing, an affidavit reproducing the itemized facts contained in the "Affidavit of Undisputed Facts."

Reporter's Notes (1997) Rule 56 introduces summary judgment for the first time to domestic relations procedure. The rule allows a party to move for summary judgment in actions for modification and actions to modify or enforce a foreign judgment. Rule 56(h) allows summary judgment only if 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."

Rule 56(a) requires that each motion for summary judgment be accompanied by an "Affidavit of Undisputed Facts" which sets forth the material facts relied upon in support of the motion. If the moving party fails to file and serve the affidavit, the summary judgment motion will be denied.

The party opposing the motion for summary judgment shall reproduce the "Affidavit of
Undisputed Facts" and shall admit those facts which are undisputed and deny those which are disputed. The opposing party has the option of filing an "Affidavit of Disputed Facts" enumerating all additional material facts where there is a genuine issue which would preclude summary judgment.

Rule 56 allows parties to jointly file a statement of stipulated

facts. If they do so, they may state that the stipulation is only for the purpose of the motion for summary judgment and is not intended to be otherwise binding. The rule also allows the judge to order the parties to meet and submit a joint statement of undisputed facts.

Sections (e), (f) and (g) of Rule 56 address the form of the affidavits, when an affidavit is not available, and sanctions for falsely made affidavits.

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.

Rule 58: Entry of Judgment

(a) **After Trial or Hearing or by Agreement.** Subject to the provisions of Rule 54(b):

(1) 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 court shall forthwith prepare, sign and enter judgment; (2) upon a decision by the court granting other relief, the court shall promptly approve the form of the judgment. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth 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. All judgments in cases governed by these rules shall enter within thirty days after completion of trial.

(b) **Upon Order of Supreme Judicial Court.** The clerk shall enter any judgment specifically directed by

the Supreme Judicial Court. (Identical to Mass.R.Civ.P. 58(b))

(c) **Nisi Judgment.** At any time before the expiration of ninety days from the entry of a judgment of divorce nisi, the defendant, or any other person interested, may file in the Registry of Probate a statement of objections to the judgment becoming absolute, which shall set forth specifically the facts on which it is founded and shall be verified by affidavit. Notice of the filing of said objections shall be given to the plaintiff or defendant or his attorney, not later than the day of filing said objections. The portion of the judgment to which any objection is filed, but only that portion, shall not become absolute until such objections have been disposed of by the court. If said petition to stay the judgment absolute is subsequently dismissed by the court, the judgment shall become absolute as of ninety days from the date of the judgment nisi.

Amended effective July 1, 1984; amended December 15, 1986, effective January 2, 1987;
amended July 18, 1988, effective August 1, 1988; amended June 8, 1989, effective July 1, 1989; amended October 6, 2004, effective November 1, 2004.

Reporter's Notes

Reporter's Notes (2004) The amendment to Rule 58 is necessitated by the implementation of the revised Time Standards Standing Order, Section 19.

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 for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the Commonwealth. On a motion for a new trial, 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. (Identical to Mass.R.Civ.P. 59(b))

(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. (Identical to Mass.R.Civ.P. 59(c))

(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. (Identical to Mass.R.Civ.P. 59(d))

(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. (Identical to Mass.R.Civ.P. 59(e))

Rule 60: Relief from Judgment or Order

(Identical to Mass.R.Civ.P. 60)

(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.

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. (Identical to Mass.R.Civ.P. 61)

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. (Identical to Mass.R.Civ.P. 62(a))

(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. (Identical to Mass.R.Civ.P. 62(b))

(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. (Identical to Mass.R.Civ.P. 62(c))

(d) **Deleted.**

(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. (Identical to Mass.R.Civ.P. 62(e))

(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. (Identical to Mass.R.Civ.P. 62(f))

(g) **Stay of Nisi Period in Divorce Cases.** The filing of an appeal shall stay the running of the nisi period as provided by Rule 58(c) only if the claim of appeal is from that portion of the judgment nisi which dissolved the marriage. If the appeal is subsequently dismissed by the appellate court, the judgment shall become absolute as of ninety days from the date of the judgment nisi. Unless the court otherwise orders, the filing of an appeal shall not stay the operation:

(i) of any other aspect of a divorce judgment; or

(ii) of any other order or judgment of the court relative to custody, visitation, alimony, support, or maintenance.

Amended December 15, 1986, effective January 2, 1987; amended June 8, 1989, effective July 1, 1989; amended April 29, 1992, effective June 1, 1992.

COMMENTS

Rule 62(g) has been added to clarify the difference between the stay of the nisi period pending an appeal from the permissive stay of any other terms of a judgment pending an appeal.

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 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 Judge, or in case of disability of such Chief Judge, by the senior judge of the Administrative Committee 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.

COMMENTS

Rule 63 has been amended to delete jury references and correct nomenclature appropriate to Probate Court.

I. Provisional and Final Remedies and Special Procedures

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.

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. On two 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 mayappear 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) **Deleted.**

(c) **Security.** Unless the court, for good cause shown, shall otherwise order, no restraining order except an order restraining any restriction on the personal liberty of a person, 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. 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. (Identical to Mass.R.Civ.P. 65(d))

(e) **Deleted.**

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 there addresses are known. (Identical to Mass.R.Civ.P. 65.1)

Rule 66 (Deleted)

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. (Identical to Mass.R.Civ.P. 67)

Rule 68 (Deleted)

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. (Identical to Mass.R.Civ.P. 69)

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. (Identical to

Mass.R.Civ.P. 70)

Rule 71 (Deleted)

Rules 72-76 (Reserved)

I. Courts and Clerks

Rule 77: Courts and Registers

(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. (Identical to Mass.R.Civ.P. 77(a))

(b) **Register's Office.** The register's office for each county with a register or assistant register in attendance shall be open during business hours on all days except Saturdays, Sundays and legal holidays.

(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. (Identical to Mass.R.Civ.P. 77(c).)

(d) **Notice of Orders or Judgments.** Unless an order or judgment is entered in open court in the presence of the parties or their counsel, the register shall immediately upon the entry of an order or judgment serve a notice of the order including the terms of any order of custody, support or alimony by mail in the manner provided for in Rule 5 upon each party 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 register 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.

(e) **Transmittal of Papers.** At the direction of the Chief Judge, the registers of 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

register for the county in which the case is pending. The register for the county in which the case is heard shall certify the proceedings had in his county to the Chief Judge of the Probate Courts and, at the direction of any judge of the court, shall return to the register for the county in which the case is pending all the papers, to be kept there on file.

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. (Identical to Mass.R.Civ.P. 78)

Rule 79: Books and Records Kept by the Register 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. (Identical to Mass.R.Civ.P. 79(a))

(b) **Indices; Calendars.** Suitable indices of the civil docket shall be kept by the clerk according to law under the direction of the court. (Identical to Mass.R.Civ.P. 79(b))

(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. (Identical to Mass.R.Civ.P. 79(c))

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. (Identical to

Mass.R.Civ.P. 80(a))

(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. (Identical to Mass.R.Civ.P. 80(b))

I. General Provisions

Rule 81: Applicability of Rules

(a) Applicability in General. These rules apply to all civil proceedings in courts whose proceedings they govern except:

(1) proceedings pertaining to the writ of habeas corpus;

(2) Deleted;

(3) proceedings pertaining to the disciplining of an attorney;

(4) to (8) Deleted.

In respects not governed by statute, the practice in the enumerated proceedings 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. (Identical to Mass.R.Civ.P. 81(b))

(c) **Deleted.**

(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. (Identical to Mass.R.Civ.P. 81(d))

(e) Procedure Not Specifically Prescribed. When no procedure us specifically prescribed, the court shall proceed in any lawful manner not inconsistent with the Constitution of this Commonwealth, these rules, or any applicable statute. (Identical to Mass.R.Civ.P. 81(e))

(f) Deleted.

(g) Deleted.

(h) The following definitions for purposes of these rules apply to terms as appearing in Mass.R.Civ.P.:

(1)	*Clerk* includes Register of Probate.
(2)	*Justice* includes Judge of Probate Court.
(3)	*Chief Justice* includes the Chief Judge of Probate Court.
(4)	*Superior Court* includes Probate Court.
(5)	The word "*complaint*" includes "*petition*" and "*libel*."
(6)	The words "*jury*" and "*verdict*" and Rules applicable to jury cases apply only to courts having jurisdiction of jury trials.
(7)	*Third-party actions* shall not be applicable to Domestic Relations matters.
(8)	References in Mass.R.Civ.P. to actions including remanded cases and/or defenses and the capacity of parties not recognized in Domestic Relations practice as set out in Rule 1 shall be inapplicable to Domestic Relations cases.
(9)	In Domestic Relations matters in the Probate Court forms, where prescribed, will be required in lieu of pleadings.

COMMENTS

Rule 81(a), (c), (f) and (g) have been amended by deleting proceedings not applicable to Domestic Relations Courts. Rule 81(h) has been added to broaden the definitions of some terms as appearing in Mass.R.Civ.P.

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. (Identical to Mass.R.Civ.P.Rule 82)

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. (Identical to Mass.R.Civ.P. 83)

Rule 84: Forms

Rule 84 has been reserved pro tem. NOTE: Separate forms to be drafted which in Domestic Relations practice in Probate Court shall be mandatory.

Rule 85: Title

These rules may be known and cited as the Massachusetts Rules of Domestic Relations Procedure (Mass.R.Dom.Rel.P.).