Rules of Appellate Procedure

Supplemental Reading

CAFL Appellate Certification Training

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Amendments to the Appeals Court Rules (not to be confused with the Rules of Appellate Procedure) and Standing Orders (effective July 1, 2020):

What CAFL Appellate Lawyers Need to Know

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If you are like me, you probably do not know much about the current Appeals Court Rules. To be honest, the only rule I can identify is Rule 1:28 regarding unpublished decisions (soon to be Rule 23.0 decisions!). On the other hand, you are probably familiar with many of the Appeals Court Standing Orders, such as those governing single justice practice and electronic filing. On July 1, 2020, all current rules, policies, and standing orders will become part of the amended Appeals Court Rules ("M.A.C. Rules"). Separate standing orders will no longer exist.

The purpose of the amended M.A.C. Rules is to make it easier to find and reference the applicable authority. You will notice that the M.A.C. Rules are not numbered sequentially. Instead, each rule has been assigned a number that corresponds to the most closely applicable Mass. Rule of Appellate Procedure ("Mass. R.A.P."). For example, the Appeals Court re-labeled its "Standing Order Governing Motions to Stay a Judgment or Execution of Sentence Filed Pursuant to Mass. R.A.P. 6" as "M.A.C. Rule 6.0, Motions to Stay Execution of a Judgment or Sentence Filed Pursuant to Mass. R.A.P. 6." The standing order is directly relevant to Mass. R.A.P. 6 ("Stay or injunction pending appeal").

The following is a brief overview of the amended M.A.C. Rules. It does not include all changes and is not meant to be a substitute for reading the Rules in their entirety. The full version of the M.A.C. Rules can be found here: https://www.mass.gov/law-library/massachusetts-appeals-court-rules.

Rule 1.0 Practice Before a Single Justice

M.A.C. Rule 1.0 is adopted from the current Rule 2:01 (with a few minor revisions). M.A.C. Rule 1.0 governs the authority of a single justice of the Appeals Court to hear any matters within the Court's jurisdiction, and which might otherwise be disposed of by a single justice of the SJC. This

rule also permits the matter to be reviewed by an Appeals Court panel. See Mass. R. A. P. 1(a) and (b).

Rule 6.0 Motions to Stay Execution of a Judgment or Sentence Filed Pursuant to Mass. R. A. P. 6

This one is important! M.A.C. Rule 6.0 adopts the current standing order regarding the Stay of a Judgment (with minor revisions that do not substantively affect CAFL practice). M.A.C. Rule 6.0 specifies that the motion for stay must state:

- the nature of the judgment
- the rationale of the lower court for denying the stay
- a statement of the issues of law, and
- the specific relief sought.

The motion must also have "an addendum containing copies of the judgment, notice of appeal, and the trial court's order denying the prior motion for a stay (including a typed version of any pertinent handwritten or oral endorsement, notation, findings, or order made by the lower court)." Rule 6.0 limits the size of the motion for stay to either five pages of text in monospaced font or 1,000 words in proportional font. See Mass. R.A.P. 20(a)(4)(A)-(C).

Rule 6.0 also requires attorneys to attach a memorandum of law to any motion for a stay of the judgment. The memorandum is limited to "15 pages of text in monospaced font or 3,500 words in proportional font compliant with Mass. R.A.P. 20[a][4][A]-[C] without leave of the court." This memorandum should also have a consecutively numbered record appendix, with all relevant portions of the record and a table of contents.

The non-moving party may (but does not have to) file a response that is also limited to 15 pages of text in monospaced font or 3,500 words in proportional font and compliant with Mass. R.A.P. 20[a][4][A]-[C]. The response may restate the facts if the non-moving party is dissatisfied with the original statement of facts, and the response may be accompanied by a supplemental record appendix containing additional portions of the record that the movant failed to include in its record appendix. Any responses must be served seven days after the service of the motion or ten days if the original motion was serve by first-class mail.

Both the motion for stay and any response must be e-filed, contain a certificate of service indicating what attorneys represents what party, and have a certificate of compliance telling the word-count if using proportional font. All pleadings should be also filed in the trial court.

Once the motion for stay is filed, the single justice has discretion whether to hold a hearing.

Rule 10.0 Docketing Statement for All Appeals (Civil and Criminal)

M.A.C. Rule 10.0 adopts the current standing orders regarding the filing of docketing statements in civil and criminal appeals. A civil docketing statement must be filed within 14 days of entry of an appeal. Each appellant must file their own docketing statement. (For example, if a child client is only appealing the permanency plan or decision to deny post-adoption visits, that child still needs to file a docketing statement because the child is an appellant.) If an attorney fails to file a docketing statement, the court can (and likely will) deny motions to enlarge the time to file a brief until the docketing statement is filed.

Rule 13.0 Electronic Filing

M.A.C. Rule 13.0 adopts and updates the current standing order regarding electronic filing. The substantive requirements have not changed. Although M.A.C. Rule 13.0 does not require electronic filing in impounded cases, electronic filing is preferred by the Appeals Court and required by the CAFL Appellate Panel Support Unit.

Rule 13.0 requires all attorneys with cases pending in the Appeals Court to register with eFileMA.com. Once a brief is e-filed, no paper copies need be sent to the Court. Similarly, attorneys do not need to file a copy of an application for further appellate review (or opposition/response) with the Appeals Court once it has been successfully filed in the SJC. Attorneys must also keep a current email address on register in the eFileMA.com system in order for them to receive e-service from other lawyers and to receive any orders, judgments, decisions, or rescripts from the Clerk's Office. Attorneys must also be sure to designate the filings on child welfare cases as "impounded" in the "appropriate field on EFileMA.com." All e-filed documents must comply with all the e-filing Rules of Appellate Procedure (found on the Appeals Court website).

Complicated stuff! But Rule 13.0 invites us to contact the Clerk's Office with any questions about e-filing.

Rule 15.0 Review of Action on Motions Requesting Procedural Relief

This is another big one, applicable anytime a single justice denies your motion for leave to return to the trial court for a motion for new

trial/relief from judgment. New Rule 15.0 combines current Rule 2:02 with new provisions that formalize current practices of the Appeals Court regarding motions for procedural relief.

According to new Rule 15.0, a single justice has "authority to grant or deny any request for procedural relief." But the Appeals Court clerks may also act on procedural motions. If you are dissatisfied with the action or order of a clerk, the single justice can review that decision if you file a motion for reconsideration within 14 days.

You can also seek a full panel review of a single justice procedural decision under Rule 15.0. In such a case, the single justice will be treated like the "lower court" within the meaning of the Rules of Appellate Procedure. You will have to docket the review of a procedural decision as a new appeal or have it consolidated with the pending appeal. If this review is treated as a new appeal, you have only 14 days to submit a memorandum, which is limited to "10 pages in monospaced font or 2,000 words in proportionally spaced font." The memorandum of law must have a record appendix that includes the papers filed with the single justice. The appellee "shall" file a response within 14 days. Proceedings in the underlying appeal shall not be stayed unless by order of the Court or a single justice. If the single justice procedural appeal is consolidated with your initial appeal, and you have filed a brief in the underlying appeal, you have 14 days after entry of the consolidation order to file your memorandum of law.

Rule 19.0 Dismissals of Appeals and Reports in all Cases for Lack of Prosecution

Rule 19.0 adopts and revises the current standing order concerning dismissals of appeals and reports for lack of prosecution (sometimes referred to as "Standing Order 17A"). Under this Rule, the clerk will notify the attorneys if an appellant does not file a brief. Similarly, if an appellant does not file a status report within the time ordered by the court, notice will be sent out to the attorneys that the appeal will be dismissed "for lack of prosecution unless, within 21 days of the date of the notice, the clerk shall receive (A) a motion by that appellant to enlarge to a date certain set forth in the motion the time for serving and filing the brief or appendix, and (B) an affidavit of the attorney of record for the appellant, or the self-represented appellant, which shall set forth good cause for the enlargement in accordance with the provisions of Mass. R. A. P. 14(b) and 15."

If the appeal is, in fact, dismissed, an Appeals Court clerk will notify the trial court and the parties of the dismissal in 14 days. During that 14 days, the appellant may file a motion to reinstate the appeal and the brief

that was previously due. That motion will be decided by a single justice. But if the Appeals Court's notice of dismissal has already been sent to the trial court, the appellant must file a motion to reinstate the appeal to the single justice but must also show: "(A) excusable neglect for the lack of prosecution, and (B) the existence of a meritorious case."

Rule 20.0 Form of Petitions to the Single Justice Pursuant to G.L. c. 231, § 118 (first paragraph) or Rule 12(a) of the Uniform Rules on Impoundment Procedure

M.A.C. Rule 20.0 adopts the current standing order of the same name. There are no significant substantive changes. Rule 20.0 tells us the format requirements for a G.L. c. 231, § 118 (first par.) single justice petition. (The c. 231, § 118 single justice process is how we appeal from adverse 72-hour hearing orders out of the Juvenile Court.)

Under Rule 20.0, the petition must contain:

- a request for review, stating the nature of the order, the entry date of the decision, and the name of the judge
- issues of law
- whether anyone is expected to file a motion to reconsider,
- a statement of specific relief,
- a proposed order, and
- an addendum with "the order or action of the trial court (including a typed version of any pertinent handwritten or oral endorsement, notation, findings, or order made by the lower court)."

A petition cannot exceed 5 pages of monospaced text of 1,000 words of proportional font.

The petition must be accompanied by a memorandum of law and record appendix. The memorandum of law can't exceed "15 pages of text in monospaced font or 3,500 words in proportional font compliant with Mass. R. A. P. 20[a][4][A]-[C]." The consecutively-paged record appendix must have relevant portions of the record, including "a current copy of the trial court docket entries and all relevant documents filed in the trial court, including those filed by the other party or parties." The appendix should have a table of contents and contain "only those pleadings, exhibits, and documents which were before the trial court when the order appealed from was entered, and which are necessary for an adjudication of the issues raised, may be submitted."

Other parties have seven days to respond (or ten days if served by mail), should they choose to do so. Responses cannot exceed "15 pages of text in monospaced font or 3,500 words in proportional font[.]" Responding attorneys may file a supplemental record appendix containing additional portions of the record before the trial court that are necessary for adjudication.

All single justice petition rules about e-filing, certificates of compliance, designating impounded materials, and certificates of service are similar to those required under Rule 6.0 for motions for stay (described above). Similarly, the single justice has discretion whether to have a hearing.

Rule 22.0 Oral Argument

This rule adopts and retitles current Rule 1:26, "Sittings for Hearing Questions of Law." The text has been revised to reflect the Appeals Court modern scheduling practice for oral argument. Rule 22.0 states that oral arguments will be held at Boston from September through June each year. But, as we have seen over the years, oral arguments may be held "at such other places or times as the chief justice of this court from time to time may order." (That is, over the summer.)

Rule 23.0 Summary Disposition (formerly known as Appeals Court Rule 1:28)

So sad! No more "Rule 1:28 decisions." Now they are "Rule 23.0 decisions." It's just not the same . . .

Rule 23.0 adopts and retitles current Rule 1:28, "Summary Disposition." The Rule no longer includes the language requiring the full text of cited Rule 1:28 decisions to be included in the addendum because Mass. R.A.P. 16(a)(13) now contains this requirement and extends it to all unpublished decisions.

Under new Rule 23.0, unpublished decisions are for when the panel determines "that no substantial question of law is presented by the appeal or that some clear error of law has been committed which has injuriously affected the substantial rights of an appellant and may, by its written order, affirm, modify, or reverse the action of the court below."

Rule 23.0 clarifies how to cite to an unpublished decision: Adoption of Bobbie, 94 Mass. App. Ct. 1112 (2020) (M.A.C. Rule 23.0).

No unpublished decision issued before February 26, 2008 may be cited by litigants because it was not until 2008 that Chace v. Curran, 71 Mass. App. Ct. 258, 260 n. 4 (2008) was decided, which permitted unpublished decision to be cited for persuasive value only.

Rule 31.0 Electronic Notification of Court Orders, Notices, and Decisions in Lieu of Paper Notice

Rule 31.0 permits clerks to serve orders via e-mail. Orders can be signed electronically by the judges or clerks and have full force and effect.

It is important for attorneys to register their current email address with the Appeals Court and the Board of Bar Overseers. If your email address changes, you have to "file a Change of Electronic Mail Address Form within 3 business days of [the change]." Attorneys must also ensure that their business email address registered with the Board of Bar Overseers is up to date.

Rule 32.0 Title

The Massachusetts Appeals Court Rules should be cited as "M.A.C. Rule #."

E-FILING A BRIEF AND RECORD APPENDIX

Tips for the CAFL Appellate Lawyer

By Ann Narris, CAFL Staff Attorney

Both the Appeals Court and CAFL are now asking attorneys to e-file all CAFL appellate briefs, motions, and single justice petitions. The Appeals Court has obtained a new contract with Tyler Technologies, the e-filing portal, and its portal now better protects impounded material.

The Tyler system allows attorneys to file and serve searchable PDF documents without having to submit paper originals or copies—in fact, if you do e-file you cannot also submit paper. This new e-filing rule applies to single justice petitions, too.

Basics

The Appeals Court uses the eFileMA.com portal. It is designed to be user-friendly. You have an "account dashboard" showing your open cases, and if you have any questions, there is a "show me how to..." button. There are also videos and an FAQ section. We strongly encourage everyone to join the Appeals Court Listserve, because the Appeals Court sends out new information on the e-file system by email. To sign up, send an email to:

MassAppealsCourt-Join@jud.state.ma.us.

Getting started

Everyone should sign up to get an account on eFileMA.com. This will enroll you in the Appeals Court e-service and e-notice program. All attorneys filing in the Appeals Court are required to maintain their current business email address on the e-file "public list." By signing up, you are consenting to receive service this way. (Note: You must include the other attorneys' email addresses in your certificate of service. If you can't find another attorney's information on this public list, the rules say that you should make conventional, paper-copy service.)

The mechanics

Attorneys should get a scanner and Adobe Writer (not just Adobe Reader) or comparable PDF software. This software allows you to create searchable PDFs, edit them, and number the pages. If you do not have this hardware or software, there is a computer and scanner open to the public in the Clerk's Office of the Appeals Court. If you need to convert paper into PDF, many CPCS printing vendors already have this capability. **All e-filed briefs must be in searchable PDF format.**

Here is a great link with information on how to e-file your brief and record appendix: https://www.mass.gov/service-details/create-an-e-filed-brief-addendum-and-appendix. There are helpful "quick tips" at the bottom of this website.

Numbering and assembling documents

Page numbering is tricky the first time you do it. Use "bates number" on your PDF software. The Appeals Court posts instructions on how to use this function on its website: https://www.mass.gov/lists/additional-pdf-forms-and-user-guides

When e-filing the brief, **every page must be numbered, starting with the cover or first page**. The page numbering must exactly match the pagination as it appears in the PDF software. If the record is more than 25 mega-bites (MB), you must submit it in multiple volumes. Each volume can be no more than 25 MB. To determine how many MBs each volume has, right click on the document, click "properties," then click "size." **Then you must number each volume (I through X) individually, starting with number 1 on the first page of that volume.** Each volume must include a table of contents and have a Roman numeral volume designation on the cover.[1]

You must mark the first page of any filing made on eFileMA.com with the word "IMPOUNDED." Also, designate the filing as impounded on the e-file system in the field that asks for that information.

Beware of metadata

If you have used the "track changes" function during your editing, make sure to use your software's scrub function to clean out any metadata. If you do not take this step, the judges and clerks may be able to see prior edits, changes, comments, and versions of the text, even if you think that it is hidden. Clicking "hide changes" or "accept all changes" is not enough.

Important changes

Emotions@appct.state.ma is dead.

The emotions@appct.state.ma.us email address – the old e-filing system – has been shut down (as of September 1, 2018). Do not use it for any filings! All e-filings must be made as searchable PDFs through eFileMA.com.

No paper copies.

Do not file paper copies (or originals) in the Appeals Court if you e-file; this applies to single justice petitions and final appeals.

[1] When e-filing a single justice petition under G.L. c. 231, § 118 or a motion for stay pending appeal, the record appendix must be consecutively numbered starting with the cover or first page, as well. The cover page will be numbered "page 1," followed by a table of contents (starting at page 2) that lists each document contained in the appendix and the page on which it appears.

New deadline.

The e-file deadline is 11:59 p.m. on the day the document is due (not at the close of business for the Clerk's Office). An e-filed document is considered filed at the time it's submitted UNLESS it's later rejected by the Clerk's Office for non-compliance with the rules. So please don't wait until 11:59. If you e-file it earlier (preferably a day or two earlier), you'll have some wiggle room to re-file if the Clerk's Office rejects it.

No copies of FARs and DARs to the Appeals Court.

If you e-file an FAR or DAR application with the SJC, you no longer have to send a copy to the Appeals Court.

Docketing changes.

We are no longer filing a Motion to Docket the Appeal or even a letter requesting that the appeal be docketed. Instead, we must e-file a "civil appeal entry form":

https://www.mass.gov/files/documents/2019/03/04/Civil%20Appeal%20Entry%20Form0.pdf.

The civil appeal entry form has a filing code in the eFileMA portal. You will e-file this form along with your client's affidavit of indigency and motion to waive the docketing fee.

Other changes.

The amended Rules of Appellate Procedure require other changes not listed here. For a memorandum on those changes, click this link:

CAFL Summary of Appellate Rules of Procedure

Waiver accounts

The Appeals Court has added filing codes to the waiver account that will allow you to e-file your affidavit of indigency and motion to waive filing fees and the uploading fees. You can then create a "waiver account" in your efileMA account. Step-by-step instructions on how to do this can be found by using the handy-dandy "Show me how to..." button. If you have questions about this, call the Appeals Court Clerk's Office.

2019 Amendments to the Mass. Rules of Appellate Procedure (effective March 1, 2019): What CAFL Appellate Lawyers Need to Know

By Jaime Prince, Esq.
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The following overview of the amended Mass. Rules of Appellate Procedure details the most important changes to child welfare appellate practice. It does not include all changes and is not meant to be a substitute for reading the amended Rules in their entirety. The full version of the amended Rules can be found here: https://www.mass.gov/law-library/massachusetts-rules-of-appellate-procedure. Please note that, beginning on March 1, 2019, CAFL will require that all briefs be filed in the Appeals Court electronically. For more information on e-filing, see the Appeals Court standing order at: https://www.mass.gov/appeals-court-rules/appeals-court-standing-order-concerning-electronic-filing. You can also find e-filing tips and resources on the CPCS website at: https://www.publiccounsel.net/cafl/professional/appellate-practice-tools-and-resources/electronic-filing/

Global Amendments to the Rules

- Gender neutrality. Masculine (he, him, his) pronouns are replaced by gender-neutral phrases.

- Word count. Counsel may now use a word count as an alternative to a page limit. Counsel must use a proportionally spaced font if using a word count. Counsel must use a monospaced font if using a page limit.

  - Practice Note: In proportionally spaced fonts (used if you are doing word-count limits), different letters have different sizes. Examples of commonly-used proportional fonts are Times New Roman, Verdana, Arial, Georgia, and Comic Sans. Each character in a monospaced font (used if you are doing page limits), including punctuation, has exactly the same width. There is no width difference, for instance, between the letter "I" and the letter "W." Examples of commonly-used monospaced fonts include Courier New, Fixedsys, Monaco, Lucida Console, and Andale Mono. Under the amended Rules, the word limits are:

    - 11,000 for a principal brief in all cases except cross appeals (Rule 20(a)(2)(A));
    - 4,500 for a reply brief in all cases except cross appeals (Rule 20(a)(2)(B));
    - 11,000 for an appellant's principal brief in a cross appeal (Rule 20(a)(3)(A)); 13,000 for an appellee's principal/response brief in a cross appeal (Rule 20(a)(3)(B));

- 11,000 for an appellant's response/reply brief in a cross appeal (Rule 20(a)(3)(C));
- 4,500 for an appellee's reply brief in a cross appeal (Rule 20(a)(3)(D));
- 7,500 for an amicus brief (Rules 20(a)(2)(C) and (a)(3)(E));
- 2,000 for a motion for reconsideration or modification of decision (Rules 27(b) and (c));
- 2,000 for argument in applications for direct appellate review and for further appellate review, as well as any response to those documents (Rules 11(b), 11(c), and 27.1); and
- 1,000 for a response to a transfer from the Supreme Judicial Court (Rule 11.1).

- Changing "paper" to "document." The word "document" replaces the word "paper" throughout the Rules. This allows for different media and is consistent with the Appeals Court's transition to electronic filing.

- Changing deadlines to increments of seven days. Many (but not all) filing deadlines are now in increments of seven to guarantee that the deadline falls on a weekday. Most 10-day deadlines are converted to 14-day deadlines, and all 20-day deadlines are now 21-day deadlines. (Rules 14(a), 23(a), and 27.1(a)) The appellant's brief is still due 40 days after docketing of the appeal and the appellee's brief is still due 30 days after service of the appellant's brief.

- Changing "trial court" to "lower court." All references to the "trial court" are amended to "lower court." (Rule 1(c)).

- Changing "opposition" to "response." "Oppositions" are now called "responses" to reflect that the nonmoving party may not necessarily oppose the motion. While the Rules reference "responses," parties remain free to caption a response as an "opposition," should they choose.

Amendments to Individual Rules

Note: Amendments to Rules 3, 4, and 8 impact child welfare ***trial*** **practice** as well as appellate practice. Trial attorneys should become particularly familiar with these changes.

Rule 1 – Scope of Rules: Definitions

Rule 1 changes the following definitions:

- "First class mail or its equivalent." Third-party commercial carriers can now be used, as long as delivery occurs within three days.

- Child welfare cases defined under G.L. c. 190B now clearly include guardianships of minors. Although that was always the Rule's intent, its prior definition was

inaccurate and confusing.

- The definition of "decision" now distinguishes the appellate court's written opinion from the "rescript," which is the appellate court's direction or mandate to the lower court disposing of the appeal.

Rule 3 – Appeal—How Taken

A party filing a notice of appeal now must serve the notice on all parties. (Rule 3(a)(1)).

If a child is appealing any portion of the decree, child's counsel must sign the notice of appeal. (Rule 3(c)(2)). Attorneys typically did this in practice, but it wasn't required by the rule. Parents are still required to sign their own notice of appeal and attorneys cannot do so for them.

Any motion to withdraw after the case is docketed in the appellate court must be filed in the appellate court with service on all parties of record. (Rule 3(f)(4); Rule 10(d)).

- Practice Note: Ordinarily, trial counsel should not file a motion to withdraw when the matter is on appeal. Trial counsel is obligated to remain counsel of record at the trial level to handle any matters that arise in the trial court and to assist appellate counsel with assembling the record for appeal. If trial counsel must withdraw *prior to* the case docketing in the appellate court, trial counsel should file a motion to withdraw in the trial court and request the appointment of successor trial counsel (even for parents whose rights have been terminated, if appealing). If trial counsel must withdraw *after* the appeal is docketed, the motion to withdraw should be filed in the appellate court AND a request for appointment of successor trial counsel should be filed in the trial court.

Rule 4 – Appeal—When Taken

Rule 4 now clarifies that the time for filing an appeal of certain motions runs from the entry of the order disposing of the last remaining motion. (Rule 4(a)(2); Rule 4(a)(3)).

Rule 8 – The Record on Appeal

There are quite a few amendments to this Rule; please read it carefully. Changes that apply to child welfare cases include:

The lower court clerk must order the transcript, unless the parties stipulate otherwise, within 14 days of the filing of a notice of appeal. (Rule 8(b)(2)). The previous Rule required the clerk to order the transcript within ten days.

The procedure for reconstructing the record when a transcript is unavailable is substantially modified. The appellant must file a motion to reconstruct the record within 14 days of filing the notice of appeal. The lower court shall specify the time period for

the attorneys to confer and the appellant to file a proposed statement of the proceedings after that motion has been filed. Within 14 days of service of the proposed statement, any other party may file objections or proposed amendments. The lower court shall promptly settle any disputes. (Rule 8(c)).

- Practice Note: Although the burden to order the transcript is on the lower court clerk, trial counsel must ensure that a recording exists, and if not, move for reconstruction of the proceedings within 14 days of filing the notice of appeal. Of course, counsel may not know that the audio is missing until reviewing the transcript. Make sure to review the docket entries and speak with trial counsel to confirm what hearing dates you need transcribed. Promptly make a written request for the transcript for those dates. If the transcriber reports that there is no record on certain dates or that there are missing portions, file the motion to reconstruct as soon as you become aware of the issue and explain the late discovery of the missing record.

The lower court must approve all stipulations regarding missing portions of the record, corrections to the record, and inaudible recordings. (Rule 8(e)).

- Practice Note: Appellate counsel will generally be the one to identify a missing portion of the record or inaudible recording after receiving the transcript. However, trial counsel must be available to promptly assist appellate counsel in correcting or modifying the record and filing the stipulation in the lower court for approval. Trial counsel must also be available to present any disputed portions of the record or transcript to the lower court in the form of affidavits or testimony so that the judge can settle the dispute.

Rule 9 – Assembly of the Record; Reproduction of Exhibits; Notice of Assembly; and Transmission of Documents form the Lower Court

Rule 9 has been substantially restructured, although the majority of the changes deal with the lower court clerk's duties. The lower court clerk now must assemble the record within 21 days of receipt of the transcript. (Rule 9(e)).

- Practice Note: Of course, the court can't really assemble the record until the findings are done. If the clerk assembles the record before the findings are done, move to vacate the assembly. We suspect that this Rule will, in child welfare cases, be honored mostly in the breach.

Rule 10 – Docketing the Appeal

Appellants now have 14 days from receiving the notice of assembly to docket the appeal. (Rule 10(a)(1)(A)).

If constitutional challenges to legislative acts are made, and the Commonwealth is not a party to the appeal, notice must be given to the Office of the Attorney General within 14

days of docketing the appeal or immediately upon identifying the constitutional challenge, if the 14-day period has expired. (Rule 10(a)(4)). Since DCF is a party to almost all care and protection/termination appeals in juvenile court, this amendment will apply primarily to appeals in CRA and probate and family court cases.

Any attorney wishing to withdraw from a case after an appeal is docketed must file a motion to withdraw in the appellate court. (Rule 10(d)).

Rule 11 – Direct Appellate Review

Parties must apply for direct appellate review (DAR) within 21 days after the docketing of an appeal in the Appeals Court. Within 14 days of the filing of the DAR application, the other parties may file a response.

The DAR application should include (among other things set forth in the Rule) an argument consisting of not more than either ten pages of text in monospaced font or 2,000 words in proportional font, as defined in Rule 20(a)(4)(B)) The response should also consist of not more than either ten pages of text in monospaced font or 2,000 words in proportional font, as defined in Rule 20(a)(4)(B)).

Counsel must file one copy (no original) with the SJC. Seventeen copies of an application for DAR are no longer necessary. Counsel no longer needs to file a copy in the Appeals Court. (Rule 11(d)).

- Practice Note: The SJC currently does not accept e-filed briefs and appendices but is accepting requests for DAR and FAR electronically, *except in impounded cases* (that is, ours). For now, it is important to be familiar with all rules regarding the filing of papers in the SJC, including: Rule 19(d) (filing of briefs and record appendices); Rule 27.1 (further appellate review); and Rule 11 (direct appellate review). If FAR is granted and the appeal is entered in the SJC, the amended Rules require seven copies (no original) of each brief and appendix. Two copies should be served on all parties. (Rule 19(d)(1)(B). If exhibits and transcripts are bound separately, counsel should file two copies of each and serve one copy of each on the parties. (Rule 19(d)(2)(B)). If you have questions about the filing requirements, call the SJC Clerk's Office at (617) 557-1100.

Rule 13 – Filing and Service

Rule 13(d) requires a certificate of service along with all documents that are filed other than briefs and appendices.

Rule 13(e) governs certificates filed with briefs and appendices. Most importantly, the certificate of service must now appear as part of the brief. It should not be filed as a separate document, as previously required. (Rule 13(e)(1)). This is true when e-filing, as well, and the certificate of service should be included in the same uploaded document as the brief. For more information on e-filing, check out the CAFL website or the Appeals

Court website.

The amended Rules require significantly more in the certificate of service filed with briefs and appendices, including: the name of the court and the docket number of the case; the title/caption of the case; the title of the brief; the party on whose behalf service was made; counsel's name and signature, counsel's Board of Bar Overseers (BBO) number, counsel's mailing and electronic addresses, the telephone number of the person who made service; and, if that person is affiliated with a firm or office, the office name; the name and mailing address and, if known, electronic address of the person(s) served; and the date and manner of service. (Rule 13(e)(2)).

The phrase "under the pains and penalties of perjury" is no longer needed in a certificate of service.

Rule 15 – Motions

Rule 15(a) now requires, if known, a statement indicating whether the other parties assent to the motion or whether any party intends to file a response.

Rule 16 – Briefs

Attorneys must include a Summary of the Argument in any brief with more than 20 pages of Argument, or more than 4,500 words if using the word-count alternative. (Rule 16(a)(8)). The previous Rule required a Summary when the Argument exceeded 24 pages.

- Practice Note: The CAFL Appellate Support Unit encourages attorneys to write a Summary in every brief, regardless of the size of the Argument (unless, of course, the Argument is really, really short). For more information on how to do this, check out the August 19, 2014 CAFL Appellate Bulletin, found here: https://www.publiccounsel.net/cafl/professional/appellate-practice-tools-and-resources/appellate-bulletins128-unpublished-decisions/

Attorneys must write a statement of the standard of review for each issue raised. The statement may appear in the discussion of the issue or under a separate heading before the discussion of the issue. (Rule 16(a)(9)(B)).

- Practice Note: Although the amended Rule seems to permit starting each Argument section with a boilerplate statement of the standard, don't do it! It's bad writing, and judges will just skip over it. Instead, weave the standards into your argument. How? Discuss the standard for challenging factual findings *in the context* of an appellant's actual challenge to a finding. Or, mention the deference an appellate court must give a trial court's assessment of witness credibility *in the context* of an appellant's challenge to a finding based on witness credibility. That way the standard is meaningful to each argument and won't be skipped.

The brief's signature block must include the mailing and email addresses of the person who prepared the brief. (Rule 16(a)(12)).

Rule 16(a)(13) specifies the contents of the addendum to a principal brief. Importantly, an addendum must now include both a table of contents (Rule 16(a)(13)(A)) and a typed copy of any handwritten endorsement by the lower court. (Rule 16(a)(13)(B)). The Rule's comment explains: "A lower court judge will often endorse a motion or other paper with a handwritten notation that is difficult to decipher. Requiring both a copy of the original endorsement and a typed version facilitates review in the appellate court. If the lower court clerk provides a typed notice of docket entry containing the full text of the judge's order, a copy of the notice would suffice for purposes of this rule."

The appellee must include an addendum that contains the same materials required in the appellant's brief, even if the materials were already included in the appellant's addendum. (Rule 16(b)(3)). For example, an appellee must now include the judge's findings of facts, orders, and a copy of the relevant portion of law or Constitutional provisions in their own addendum. (Rule 16(a)(3)).

Rule16(j) now requires a party who has joined the brief of another party to provide notice to the clerk and other parties. (Rule 16(j)(1)).

In addition to the previously required certification, Rule 16(k) mandates that a party specify how compliance with the applicable length limit of Rule 20 was ascertained (page number or word limit). In other words, the Appeals Court wants to know if you used a monospaced font/page count OR a proportionally spaced font/word count. Best practice may be to include the actual font used, as well.

Rule 17 – Brief of an Amicus Curiae

An amicus brief must be filed no later than 21 days before the date of oral argument, unless the appellate court grants leave to file it later. (Rule 17(b)).

Any party may seek leave from the appellate court or single justice to respond to any amicus brief. (Rule 16(b)).

The standard for allowing a motion of an amicus curiae seeking to participate in oral argument was changed from "extraordinary reasons" to "good cause." (Rule 17(e)).

Rule 18 – Appendix to the Briefs: Contents, Cost, Filing, and Service

Any paper appendix must now be bound separately from a brief. (Rule 18(a)).
Rule 18(a)(1)(A) lists the items in the order in which they must appear in an appendix. (Prior Rule 18(a) did not specify the arrangement of an appendix.) The appendix now must include documents in this order: cover; table of contents; docket sheet; filings in chronological order filed below including petition, exhibits, findings, motions, orders, judgment, and notices of appeal. Attorneys are required to create a table of contents to

the appendix. (Rule 18(a)(1)(A)(ii)). The first volume of a multi-volume appendix must include a complete table of contents referencing all volumes, and each individual volume must include its own table of contents. (Rule 18(a)(1)(C)).

The Addendum can still be bound and paginated with the brief itself. (See Rule 16(a)(13), (b)(3)).

Rule 19 – Filing and Serving of Briefs, Appendices, and Certain Motions

The appellant brief is still due 40 days after the appeal is docketed. The appellee brief is still due 30 days after service of the appellant's brief. In an appeal involving multiple appellant briefs, the appellee's brief is not due until 30 days after service of the last appellant's brief. (Rule 19(a)(2)).

A reply brief must be filed by the earlier of either 14 days after service of the appellee's brief or seven days prior to a scheduled oral argument. (Rule 19(a)(3)). Previously, the time frame was 14 days after service or three days before the first day of the sitting at which the case was scheduled for argument.

Timeframes for filing briefs and appendices in cross appeals:

- Appellant's principal brief and appendix – 40 days from docketing;
- Appellee/cross-appellant's principal brief and appendix – 30 days after service;
- Appellant's reply brief – 30 days after service;
- Appellee/cross-appellant's reply brief – 14 days after service or seven days before argument, whichever is earlier. (Rule 19(b)).

- Practice Note: The CAFL administrative office is working with the Appeals Court to determine whether Rule 19 (cross appeals) governs all "hybrid" appeals by children (for example, children who are appellees for termination of parental rights but appellants for visitation). For now, assume that Rule 19 governs: we will let you know if Justice Hanlon (the current child welfare single justice) has a different plan.

If counsel is paper filing, not e-filing, the number of paper copies required in the Appeals Court has been reduced. Counsel should file four copies of each brief and appendix, and two copies must be served on counsel for each party. (Rule 19(d)(1)-(2)). Similarly, the SJC requirements have been reduced. Seven copies of each brief and record appendix should be filed, and two copies served on counsel for each party. If exhibits and transcripts are bound separately, two copies of each should be filed and only one copy served on each party.

- Practice Note: Beginning on March 1, 2019, CAFL will require all filings in the Appeals Court to be done electronically.

Rule 20 – Form and Length of Briefs, Appendices and Other Documents

Parties may now choose to use either a monospaced font (like Courier) and page count OR a proportionally spaced font (like Times New Roman) and word count for all briefs, applications, petitions, and other documents. A principal brief cannot be longer than 50 pages using a monospaced font, or 11,000 words using a proportionally spaced font. Rule 20(a)(2)(A*)*. A reply brief can be either 20 pages of monospaced font or no more than 4,500 words in proportionally spaced font. If you choose to use a proportionally spaced font, you must use 14pt or larger typeface. Rule 20(a)(4)(B). (12 pt. continues to be fine for mono spaced font.)

Page count/word count limits have been amended for cross appeals as follows:

- Appellant's principal brief – 50 pages or 11,000 words;
- Appellee/cross-appellant's principal and response brief – 60 pages or 13,000 words;
- Appellant's response and reply brief – 50 pages or 11,000 words;
- Appellee/cross-appellant's reply brief – 20 pages or 4,500 words. (Rule 20(a)(3)).

- Practice Note: As noted above, a cross appeal could include a "hybrid" appeal where a party wants part of the judgment affirmed (like the finding of unfitness) but is appealing a different part of the judgment (like approval of the "wrong" plan). Too little space to work with? Feel free to incorporate portions of another party's brief by reference.

If a proportionally spaced font is used, all margins shall be at least 1 inch. The traditional 1.5 inch left and right margins remains if a monospaced font is used. (Rule 20(a)(4)(A)).

The page numbers shall begin with the cover as page one and numbered consecutively through the last page, including the addendum. (Rule 20(a)(4)(A)).

Each appendix volume should be designated by a Roman numeral with the cover of each volume paginated as page one. (Rule 20(a)(5)).

Color requirements for cover pages do not apply to electronically filed briefs. (Rule 20(a)(6)).

Rule 22 – Oral Argument

The most important revision to this Rule relates to post-argument letters/submissions. The amended rule clarifies and broadens the parameters for such submissions. In addition to the filing of a letter pursuant to Rule 16(l), a Rule 22(c) post-argument letter may be filed: (1) when expressly allowed or authorized by the court during oral argument; (2) in order to correct a factual misstatement made during oral argument; or (3) upon a motion to submit such a letter. (Rule 22(c)(2)).

- Practice Note: Rule 22(c)(2) provides an opportunity for correcting important factual misstatements made by anyone during oral argument (including the panel) without leave of court. It also allows you to respond to new information raised by a lawyer or judge, or "surprise" questions from the panel, with leave of the panel. Previously, submissions were only allowed upon leave of court, and only to respond to a new argument made by the appellee. This is an important amendment for CAFL attorneys. Motions to submit post-argument letters should be filed whenever fairness requires. You cannot seek leave in the body of the letter; it must be a separate document.

Rule 23 – Notice of Decision; Issuance of Rescript; Stay of Rescript

Rule 23 clarifies what to do after the panel issues a decision in light of the distinction between a decision and a rescript. The prior rule caused confusion because it just referenced the rescript. The rescript is the appellate court's order, direction, or mandate to the lower court disposing of the appeal, while the decision is the court's actual written opinion or order. The clerk must send parties either copies of or a link to the rescript on the day that it is issued. Rule 23(a).

The clerk will also issue the decision and the rescript to the lower court within 28 days of the decision. Rule 23(b). However, counsel can still move to enlarge or shorten that time period under Rule 23(c). The issuance of the rescript is still stayed under the amended Rules by counsel filing certain motions or a request for FAR. Rule 23(c).

Rule 27—Motion for Reconsideration or Modification of Decision (Previously "Petition for Rehearing")

You should no longer seek a "rehearing"; instead, file a motion for the panel to "reconsider" or modify its original decision.

The motion should *not* be written as a letter addressed to the senior justice, as previously required. It should be written as a standard motion. (Rule 27(a)-(b)).

Rule 27.1 -- Further Appellate Review

An application for FAR must be filed within 21 days [not 20] after the date of decision (not rescript). (Rule 27.1(a)).

Any response must be filed within 14 days [not 10] after the filing of the application. (Rule 27.1(c)).

You must only file one copy in the SJC. (Rule 27.1(d)). You no longer need to file a copy of the application for FAR in the Appeals Court. (Rule 27.1(d)).

Rule 29 – Voluntary Dismissal of Appeal or Other Proceeding

When requesting a dismissal of the appeal after docketing, the parties should file a stipulation or motion that the proceeding be dismissed "with prejudice." (Rule 29(b)(1)).

The clerk of the appellate court is now required to promptly notify the clerk of the lower court when an appeal is voluntarily dismissed. (Rule 29(d)).