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Chapter 13: Civil Practice and Procedure

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CHAPTER 13

Civil Practice and Procedure

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§13.1. Introduction: A Year of Practice under the New Rules. This *Survey* year encompasses the first full year of practice under the new Massachusetts Rules of Civil Procedure[1] and marks the advent of the District/Municipal Courts Rules of Civil Procedure,[2] a system of rules similar in design to but different in many details from the Massachusetts Rules of Civil Procedure.[3] In general, practice under the new Rules has tended to confirm the hopes of their advocates that simplified rules of procedure might assist in securing "the just, speedy, and inexpensive determination of every action."[4]

§13.2. Interpretation of Massachusetts Rules of Civil Procedure. The Supreme Judicial Court has done much to assist the bar in changing over to the new Rules. Its decisions in this area have been both informative and faithful—perhaps to a fault—to the "liberal spirit," which exalts substance over form. Not the least of the Court's contributions has been an acknowledged adherence to practice in the federal courts under the Federal Rules of Civil Procedure. Indeed, the settled interpretation of the Federal Rules of Civil Procedure became, in *Rollins Environmental Services, Inc. v. Superior Court,*[1] the mandatory guideline for interpreting the cognate Massachusetts Rules. Al-

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§13.1. [1] The Massachusetts Rules of Civil Procedure took effect on July 1, 1974. They apply to proceedings in the Supreme Judicial Court for the County of Suffolk (the single justice session), the Superior Court, the Housing Courts of the City of Boston and the County of Hampden, to equity proceedings in the various Probate Courts, and to various designated proceedings in the Land Court. MASS. R. CIV. P. 1.

[2] The District/Municipal Courts Rules of Civil Procedure took effect on July 1, 1975. These Rules govern practice and procedure in the Commonwealth's seventy-two district courts as well as in the Municipal Court for the City of Boston. DIST./MUN. CTS. R. CIV. P. 1.

[3] For a more detailed comparison of the District/Municipal Courts Rules of Civil Procedure with the Massachusetts Rules of Civil Procedure, see § 13.7 *infra.*

[4] MASS. R. CIV. P. 1.

§13.2. [1] 1975 Mass. Adv. Sh. 2052, 2060, 330 N.E.2d 814, 818.

though this result had been foreshadowed in *Charbonnier v. Amico*[2] and *Giacobbe v. First Coolidge Corp.*,[3] the Supreme Judicial Court explicitly held in *Rollins* that, "[t]his court having adopted comprehensive rules of civil procedure in substantially the same form as the earlier Federal Rules of Civil Procedure, the adjudged construction theretofore given to the Federal rules is to be given to our rules, absent compelling reasons to the contrary or significant differences in content."[4]

This direction to interpret the Massachusetts Rules in conformity with the Federal Rules could hardly be more specific. To justify a deviant interpretation, one must be able to point to some "compelling" policy reason or "significant differences" in the language of the specific Massachusetts and Federal Rules under consideration.[5] Otherwise, the interpretation given the Federal Rules is to govern Massachusetts practice. Still, in order for the federal construction to govern, it must have been "adjudged" by some federal court.[6] Apparently, the views of commentators on the construction of the various Federal Rules of Civil Procedure, although perhaps persuasive, are not deemed to be controlling for purposes of Massachusetts practice, unless those views are backed up by federal court decisions in point. It will not be sufficient, therefore, to merely cite the interpretation given by an expert on federal procedure or by the reporters to the Federal Rules in a brief on a Massachusetts procedural issue. Consequently, it would seem that if the Massachusetts courts are to be expected to follow the construction given to the Federal Rules of Civil Procedure, they ought to be directed to the specific federal court decisions upon which reliance is to be placed.

A more knotty problem may perhaps arise from the Court's direction in *Rollins* that the judicial construction to be followed in Massachusetts is that "theretofore" given to the Federal Rules.[7] The use of the word "theretofore," if deliberate, implies that the governing con-

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[2] 1975 Mass. Adv. Sh. 653, 662, 324 N.E.2d 895, 899. In *Charbonnier,* the Court noted that the new Massachusetts Rules were based on the Federal Rules. *Id.* at 662, 324 N.E.2d at 899.

[3] 1975 Mass. Adv. Sh. 894, 903-06, 325 N.E.2d 922, 926-27. By way of dictum, the Court in *Giacobbe* approved of an interpretation of a new Massachusetts Rule that was based on the accepted interpretation of the parallel Federal Rule. *Id.* at 905, 325 N.E.2d at 927.

[4] 1975 Mass. Adv. Sh. at 2060, 330 N.E.2d at 818. *Rollins* did not address the applicability of the interpretation of the Federal Rules to the Massachusetts District/Municipal Courts Rules of Civil Procedure, which took effect one year after the Massachusetts Rules of Civil Procedure. The broad language of the decision, however, compels the conclusion that the federal interpretation is expected to guide resolution of procedural problems in the district and municipal courts as well as in the superior court.

[5] *Id.*

[6] *Id.*

[7] *Id.*

struction is to be that given to the Federal Rules of Civil Procedure *before* July 1, 1974. Thus, the Federal Rules would be imported into Massachusetts practice in much the same way that the English Common Law was adopted as the American rule of decision following the American Revolution. The later decisions of the English courts, although persuasive, were not considered to be direct guides to American practice.[8] If this is what the Court meant by its use of the word "theretofore," decisions of the federal courts interpreting the Federal Rules after July 1, 1974 can merely be argued to be persuasive, not dispositive, of the identical point raised under the Massachusetts Rules. It will be unfortunate if *Rollins* is read in such a fashion. One of the great benefits to the practitioner of the adoption of Massachusetts Rules of Civil Procedure similar to the Federal Rules is the uniformity of the two systems. To consider federal procedural decisions subsequent to July 1, 1974 as merely persuasive, simply because the particular procedural point at issue had not been raised in federal practice prior to that date, would not promote such uniformity. It is to be hoped, therefore, that as interpretation of the Federal Rules evolves in the federal courts, such evolution will be followed in Massachusetts absent compelling reasons to the contrary or significant differences in content in the Massachusetts Rules.

§13.3. The Doctrines of Primary Jurisdiction and Exhaustion of Administrative Remedies.[1] The proliferation during the past few decades of agencies charged with regulatory and adjudicatory functions has led to the adoption in the Commonwealth of two doctrines that are intended to guide the judiciary in deciding when to grant review of controversies that have been or can be subject to administrative review as well. Aspects of these doctrines—the doctrine of exhaustion of administrative remedies and the doctrine of primary jurisdiction—were clarified by the Supreme Judicial Court in two of its decisions rendered during the *Survey* year. In *Ciszewski v. Industrial Accident Board,*[2] the Court further defined the scope of an exception to the exhaustion doctrine by holding that a dispute over whether an agency has the authority and power under its enabling statute to promulgate regulations need not be resolved by final agency action prior to judicial review because it falls within the class of disputes for which administrative remedies would be inadequate or resort to them futile.[3] Then, in *J. & J. Enterprises, Inc. v. Martignetti,*[4] the Court stated

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[8] *See generally* H. HART & A. SACKS, THE LEGAL PROCESS 450-51 (tent. ed. 1958); R. POUND, THE FORMATIVE ERA OF AMERICAN LAW 96-97 (1938); Hall, *The Common Law: An Account of Its Reception in the United States,* 4 Vand. L. Rev. 791 (1951).

§13.3. [1] The authors gratefully acknowledge the research of Paul J. Lambert, Esq., into the federal precedents bearing on the doctrine of primary jurisdiction.

[2] 1975 Mass. Adv. Sh. 635, 325 N.E.2d 270.

[3] *Id.* at 644, 325 N.E.2d at 274.

[4] 1976 Mass. Adv. Sh. 172, 341 N.E.2d 645.

under what circumstances, when both a court and an agency have original jurisdiction, the court should dismiss its proceedings on the grounds of the doctrine of primary jurisdiction.[5]

I. Exhaustion of Administrative Remedies.

In the Commonwealth, the general rule is that "[i]n the absence of a statutory directive to the contrary, the administrative remedies should be exhausted before resort [is had] to the courts."[6] This general rule has been consistently reaffirmed in *East Chop Tennis Club v. Massachusetts Commission Against Discrimination,*[7] *Ciszewski v. Industrial Accident Board,*[8] and *J. & J. Enterprises, Inc. v. Martignetti.*[9]

Although the general rule remains intact, the most recent developments—perhaps indicating increasing dissatisfaction with cumbersome and dilatory administrative proceedings—have been devoted to examining the extent of the exceptions to this rule. The longest-standing exception to the exhaustion rule involves petitions for declaratory judgment that raise what the Supreme Judicial Court calls "tax challenges."[10] This exception was first articulated in *Meenes v. Goldberg*[11] and has since been further defined, so that it is now apparent that an action for declaratory relief challenging some aspect of the state or municipal taxing system, which challenge will have a generalized effect upon that system, may be maintained without prior resort to the agency involved.[12]

The second recognized exception to the exhaustion doctrine is that, "[w]here the agency is acting under an unconstitutional statute, or is acting beyond its jurisdiction, a judge may . . . exercise jurisdiction de-

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[5] *Id.* at 177-81, 341 N.E.2d at 648-49.

[6] Gordon v. Hardware Mut. Cas. Co., 361 Mass. 582, 587, 281 N.E.2d 573, 577 (1972). In the *Gordon* case, the Supreme Judicial Court held that a complaint asserting allegations of unfair acts on the part of the defendant insurance company was properly directed to the Commissioner of Insurance. *Id.* at 588, 281 N.E.2d at 577.

[7] 1973 Mass. Adv. Sh. 1611, 1615, 305 N.E.2d 507, 510. This decision is the subject of an extensive note in O'Dea, *Civil Practice and Procedure,* 1974 Ann. Surv. Mass. Law § 12.4, at 271-74.

[8] 1975 Mass. Adv. Sh. 635, 643, 325 N.E.2d 270, 273-74.

[9] 1976 Mass. Adv. Sh. 172, 177-78, 341 N.E.2d 645, 648.

[10] East Chop Tennis Club v. Massachusetts Comm'n Against Discrimination, 1973 Mass. Adv. Sh. 1611, 1616, 305 N.E.2d 507, 511.

[11] 331 Mass. 688, 690-92, 122 N.E.2d 356, 358-59 (1954).

[12] *See* Massachusetts Mut. Life Ins. Co. v. Commissioner of Corps. & Taxation, 1973 Mass. Adv. Sh. 863, 866, 296 N.E.2d 805, 808; Massachusetts Ass'n of Tobacco Distribs. v. State Tax Comm'n, 354 Mass. 85, 87-88, 235 N.E.2d 557, 559 (1968); Stow v. Commissioner of Corps. & Taxation, 336 Mass. 337, 339-40, 145 N.E.2d 720, 721-22 (1957); Squantum Gardens, Inc. v. Assessors of Quincy, 335 Mass. 440, 443 140 N.E.2d 482, 484-85 (1957); Madden v. State Tax Comm'n, 333 Mass. 734, 736-37, 133 N.E.2d 252, 254 (1956). *But see* Sears, Roebuck & Co. v. Somerville, 1973 Mass. Adv. Sh. 943, 944-46, 298 N.E.2d 693, 694-95.

spite failure to exhaust administrative remedies."[13]

Finally, it has been generally recognized that courts can exercise jurisdiction, even in areas of special agency competence, if the administrative remedy available under agency procedure, regulations, or its legislative enabling act would be inadequate, or the circumstances demonstrate that resort to the administrative remedy would be futile.[14] Indeed, the litigant's right to have recourse to the courts where administrative remedies would be futile was codified in 1974 and is now set forth in chapter 231A of the General Laws.[15]

This third exception was reconfirmed and applied in *Ciszewski v. Industrial Accident Board,*[16] where the plaintiff brought an action for a declaratory judgment seeking a declaration that, under the Industrial Accident Board's enabling act, the Board was empowered to promulgate a rule of prehearing discovery permitting inspection of the work area where an injury allegedly occurred.[17] In response, the Industrial Accident Board argued that, among other things, the plaintiff had failed to exhaust her administrative remedies.[18] The plaintiff's action was dismissed in superior court, but on appeal, the Supreme Judicial Court reversed and remanded for further proceedings consistent with its opinion.[19] Chief Justice Tauro, speaking for a unanimous Court, held that, where, as in this case, no further fact-finding was required and the controversy centered around the authority and power of an agency under its enabling statute to promulgate regulations, the "inadequate or futile remedies" exception to the exhaustion doctrine should be applied.[20] The Court carefully limited its holding, however, by stating: "We emphasize . . . that this exception applies only where

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[13] *Ciszewski,* 1975 Mass. Adv. Sh. at 644 n.6, 325 N.E.2d at 274 n.6. *Accord,* Harrison v. Labor Relations Comm'n, 1973 Mass. Adv. Sh. 723, 725, 296 N.E.2d 196, 198; Hathaway Bakeries, Inc. v. Labor Relations Comm'n, 316 Mass. 136, 139-43, 55 N.E.2d 254, 255-57 (1944). One of the most definitive statements of the general rule and of this exception is found in St. Luke's Hosp. v. Labor Relations Comm'n, 320 Mass. 467, 470-71, 70 N.E.2d 10, 12 (1946). For the seminal decisions upon which judicial restraint of administrative proceedings is grounded, see Connecticut River R.R. v. County Comm'rs, 127 Mass. 50, 58-60 (1879) (Gray, C.J.); Vermont & Mass. R.R. v. County Comm'rs 64 Mass. (10 Cush.) 12, 16 (1852).

[14] Boston Edison Co. v. Selectmen of Concord, 355 Mass. 79, 84-85, 242 N.E.2d 868, 872 (1968); Jordan Marsh Co. v. Labor Relations Comm'n, 312 Mass. 597, 601-02, 45 N.E.2d 925, 927-28 (1942) (dictum).

[15] G.L. c. 231A *as amended by* Acts of 1974, c. 630, § 1. This statute, originally drafted and proposed under the auspices of the Massachusetts Law Reform Institute, is more thoroughly discussed in O'Dea, *Civil Practice and Procedure,* 1974 ANN. SURV. MASS. LAW § 12.4, at 275-76.

[16] 1975 Mass. Adv. Sh. 635, 325 N.E.2d 270.

[17] *Id.* at 636-37, 325 N.E.2d at 271-72. G.L. c. 152, § 5, states that the Board "may make rules consistent with this chapter for carrying out its provisions."

[18] 1975 Mass. Adv. Sh. at 637, 325 N.E.2d at 272.

[19] *Id.* at 637-38, 647, 325 N.E.2d at 272, 275.

[20] *Id.* at 644-45, 325 N.E.2d at 274.

the power and authority of the agency themselves are in question, and not where the exercise of that agency's discretion is challenged."[21] In the latter instance, of course, recourse must first be made to the procedures that the agency has for correcting the challenged action or order. Only after that avenue has been exhausted, can judicial review be had.

II. Primary Jurisdiction

The United States Supreme Court took the first step towards the harmonization of the roles of court and agency in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*[22] In *Abilene Cotton,* the Court held that a shipper seeking reparations predicated upon the unreasonableness of an established rate must first seek relief before the Interstate Commerce Commission.[23] The Supreme Court reached this conclusion despite its recognition that the relevant statute provided federal district courts with jurisdiction concurrent with that of the Interstate Commerce Commission over suits concerning the validity of rates.[24] The Court stated that its holding was dictated by the purpose of the Interstate Commerce Act, which was to eliminate discrimination in rates by placing on all carriers the duty to establish schedules of reasonable rates that, upon approval by the Commission, would have uniform application.[25] The Court found that the statute granted the Commission, which initially approved the rate, the power to hear complaints concerning violations of the Act, to direct the payment of reparations, and to order the carrier to cease and desist from further violations.[26] If this power were exercised by the courts, the result would be the "absolute destruction of the [A]ct."[27]

> For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a

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[21] *Id.* at 644, 325 N.E.2d at 274.

[22] 204 U.S. 426 (1907). Mr. Justice Frankfurter later referred to this harmonization as "one of those creative judicial labors whereby modern administrative law is being developed as part of our traditional system of law." Far East Conference v. United States, 342 U.S. 570, 575 (1952).

[23] 204 U.S. at 448.

[24] *Id.* at 436, 438-39.

[25] *Id.* at 439-41.

[26] *Id.* at 441.

[27] *Id.* at 440.

> right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed.[28]

In *Abilene Cotton,* the Court stressed the goal of uniformity, which would be fostered if, in the first instance, a specialized agency decided issues subject to its regulations. Subsequent federal cases emphasized as well an additional policy consideration favoring initial deferral by courts to agencies having jurisdiction over matters complained of. In *Great Northern Railway Co. v. Merchants Elevator Co.,*[29] the Supreme Court, speaking through Justice Brandeis, held again that, where the complaint filed in court raised issues within the jurisdiction of an administrative agency, the plaintiff must first seek relief before the agency involved.[30] Two reasons were given. First, resort to the agency advanced the interest of uniformity.[31] Second, a sound resolution of the issue required "acquaintance with many intricate facts of transportation" and "such acquaintance is commonly to be found only in a body of experts."[32] Similarly, the Court said in *Federal Maritime Board v. Isbrandtsen Co.*:[33]

> It is recognized that the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern. Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation.[34]

The rationales of uniformity and expertise were combined by Mr. Justice Frankfurter in an oft-quoted passage in *Far East Conference v. United States:*[35]

> [I]n cases raising issues of fact not within the conventional experiences of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business

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[28] *Id.* at 440-41.
[29] 259 U.S. 285 (1922).
[30] *Id.* at 291.
[31] *Id.*
[32] *Id.*
[33] 356 U.S. 481 (1958).
[34] *Id.* at 498.
[35] 342 U.S. 570 (1952).

> entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.[36]

During the *Survey* year, the Supreme Judicial Court addressed itself to the issue of when a court ought to apply the doctrine of primary jurisdiction. In *J. & J. Enterprises, Inc. v. Martignetti,*[37] Justice Braucher, speaking for the Court, considered various remedies that litigants may seek in situations where a court and an administrative agency have concurrent jurisdiction, and prescribed the appropriate judicial response for each situation.[38] In essence, Justice Braucher stated that:

1. Where a plaintiff seeks injunctive or declaratory relief and the entire controversy is within the exclusive jurisdiction of an administrative agency, the judicial proceedings ought generally to be dismissed.[39]

2. Where the plaintiff seeks prospective relief and the agency has jurisdiction of only part of the matter in controversy, the judicial proceedings ought also to be dismissed since the action can be reinstituted after administrative remedies have been exhausted.[40]

3. Where, however, the plaintiff seeks damages for past conduct and those damages cannot be awarded by the agency, judicial proceedings ought to be stayed until the administrative agency has acted upon those matters within its jurisdiction.[41]

As *Ciszewski* and *J. & J. Enterprises* make clear, the Supreme Judicial Court, while continuing to assert the primacy of the exhaustion and primary jurisdiction doctrines, is proceeding with extreme care to insure that the genuine rights of litigants are not impaired.

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[36] *Id.* at 574-75.

[37] 1976 Mass. Adv. Sh. 172, 341 N.E.2d 645.

[38] *Id.* at 177-81, 341 N.E.2d at 648-49.

[39] *Id.* at 177-78, 341 N.E.2d at 648. Just as actions seeking injunctive or declaratory relief as to matters that fall within the exclusive or concurrent jurisdiction of administrative agencies ought be dismissed, so too amendments to complaints seeking to raise such claims are routinely denied despite the general liberality of Massachusetts Rule of Civil Procedure 15, since "it would be an idle move for the court to allow such amendment over the objection of the opposing party who, if correct, has merely to make a formal motion to dismiss . . . after leave to amend is granted." 3 J. MOORE, FEDERAL PRACTICE ¶15.08[4], at 904-05 (2d ed. 1974). *Accord,* Knitting Machs. Corp. v. Hayward Hosiery Co., 95 F. Supp. 510, 512 (D. Mass. 1950); Potter v. Travelers Indem. Co., No. 8244 (Suffolk Super. Ct., Feb. 2, 1976) (McNaught, J.) (leave to amend denied upon the ground, *inter alia,* that the amendment sought a declaration of the reasonable level of insurance commissions required to be paid under G.L. c. 175, § 113I, which had in the first instance, to be decided by the Insurance Commissioner pursuant to G.L. c. 175, § 113H).

[40] 1976 Mass. Adv. Sh. at 179, 341 N.E.2d at 648.

[41] *Id.* at 179-80, 341 N.E.2d at 648-49.

§13.4. Class Actions: Mootness. When an individual purports to bring a suit on behalf of a class, the litigation may acquire a life of its own. General principles permitting parties to dismiss or compromise their own disputes are not applicable under the Massachusetts and Federal Rules governing class actions, which preclude dismissal or compromise without court approval.[1] During the *Survey* year, the Supreme Judicial Court held in *Wolf v. Commissioner of Public Welfare,*[2] a case of first impression, that a class action is not mooted by the termination of the individual claim of the named plaintiff who purports to represent the class.[3]

In *Wolf,* the plaintiff, who was receiving public assistance in the form of aid to families with dependent children (AFDC), sued on behalf of herself and all others receiving AFDC "[who have] failed or will have failed during the pendency of this action to receive an assistance check issued by the . . . [Department of Public Welfare (DPW)] and who have or will have been denied a prompt replacement of the check by the Department."[4] The plaintiff alleged that after not having received her bimonthly assistance check on time, she properly gave notice of that fact to the DPW but was still unsuccessful in obtaining a replacement check from the DPW, which "generally delays" in replacing such checks.[5] Therefore, the plaintiff filed this suit, seeking (1) an order that the Department replace all reportedly unreceived AFDC checks within four days of the mailing of the original, (2) a declaration that the federal Social Security Act and regulations require immediate replacement of assistance checks, and (3) that state regulations require replacement of reportedly unreceived AFDC checks within four days of the mailing of the original.[6]

The superior court dismissed the bill on the ground of mootness, since the parties agreed that the DPW did issue the plaintiff's replacement check shortly after the commencement of the suit.[7] The Appeals Court affirmed, although on different grounds, but the Supreme Judicial Court reversed, holding that a class action should not be dismissed for mootness prior to the court's determination whether it should certify the class, regardless of whether the representative plaintiff has already received the relief sought.[8]

The case is noteworthy in several aspects, the first of which is the Court's adherence to federal court precedents. The Court began its analysis of the mootness issue by noting that the issue has been the

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§13.4. [1] Mass. R. Civ. P. 23(c); Fed. R. Civ. P. 23(e).
[2] 1975 Mass. Adv. Sh. 871, 327 N.E.2d 885.
[3] *Id.* at 880-81, 327 N.E.2d at 890.
[4] *Id.* at 872, 327 N.E.2d at 887.
[5] *Id.*
[6] *Id.* at 872-73, 327 N.E.2d at 887.
[7] *Id.* at 873 & n.1, 879 n.8, 327 N.E.2d at 887 & n.1, 889 n.8.
[8] *Id.* at 880-81, 327 N.E.2d at 889-90.

subject of considerable attention in federal courts and by citing to several federal court cases holding that a named plaintiff's receipt of desired relief does not moot a class action.[9] Although the English Bill of Peace is a common ancestor to both Massachusetts and federal class actions,[10] the advent of the Federal Rules of Civil Procedure, which categorized classes somewhat ambiguously in 1938 and then more functionally by amendment in 1966,[11] gave an impetus to class actions in federal courts that was absent from Massachusetts litigation.[12] Class action precedents are thus more likely to be federal.

Furthermore, the Court's initial examination in *Wolf* of the relevant federal case law reflects to some extent its continuing reliance on federal interpretations, a practice that culminated recently in its holding in *Rollins Environmental Services, Inc. v. Superior Court*[13] that the adjudged construction previously given to the Federal Rules is to be given to the Massachusetts Rules in the absence of compelling reasons to the contrary or significant differences in context.[14] This holding was not controlling in *Wolf,* since suit was commenced prior to the effective date of the new Rules and since federal views of mootness are based on the constitutional limitation of the jurisdiction of federal courts to actual cases or controversies.[15]

Since federal precedents should be more restrictive—because of the additional case or controversy requirement—the cited cases *upholding* jurisdiction on facts similar to those in *Wolf* would be influential. Nevertheless, the Supreme Judicial Court's analysis of the rationale of the mootness doctrine provides a sounder underpinning to its decision than mere reliance on federal precedent. Judge Wilkins, writing for a unanimous Court, analyzed reasons underlying refusals to hear moot cases as follows:

> (a) only factually concrete disputes are capable of resolution through the adversary process, (b) it is feared that the parties will not adequately represent positions in which they no longer have a personal stake, (c) the adjudication of hypothetical disputes would

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[9] *Id.* at 876 & n.6, 327 N.E.2d at 888 & n.6, *citing* Like v. Carter, 448 F.2d 798, 802 (8th Cir. 1971), *cert. denied,* 405 U.S. 1045 (1972); Copeland v. Parham, 330 F. Supp. 383, 385 (N.D. Ga. 1971), *aff'd sub nom.* Copeland v. Saucier, 475 F.2d 1127, 1129 (5th Cir. 1973); Adens v. Sailer, 312 F. Supp. 923, 926 (E.D. Pa. 1970).

[10] Chafee, *Bills of Peace with Multiple Parties,* 45 HARV. L. REV. 1297, 1307-10 (1932).

[11] *Advisory Committee's Note to Federal Rule of Civil Procedure 23,* 39 F.R.D. 98-107 (1966).

[12] See Spear v. H.V. Greene Co., 246 Mass. 259, 266-67, 140 N.E. 795, 797-98 (1923) for an analysis of the prerequisites to maintenance of a class bill under case law antedating the new Massachusetts Rules.

[13] 1975 Mass. Adv. Sh. 2052, 330 N.E.2d 814, *discussed in* § 13.2 *supra.*

[14] *Id.* at 2060, 330 N.E.2d at 818.

[15] U.S. CONST. art. III, § 2, cl. 1; Liner v. Jafco Inc., 375 U.S. 301 (1964).

encroach on the legislative domain, and (d) judicial economy requires that insubstantial controversies not be litigated.[16]

He then reasoned that these judicial concerns would be met in this case, if there was an actual controversy between the class and the defendant, if the case was appropriate for class treatment, and if the plaintiff was an adequate representative of the class.[17] Since suit was begun before the effective date of the new Rules, the Court relied upon the leading Massachusetts pre-Rules case on class actions as authority for this line of reasoning.[18] However, the Court also specifically referred to Massachusetts Rule of Civil Procedure 23 as authority, thereby implying that its holding would have been the same had the new Rules been in effect.[19]

Several "independent considerations" militating against mootness also influenced the Court's decision. One independent consideration that influenced the Court's decision in *Wolf* was the Court's unwillingness on the basis of traditional equity principles to permit a defendant's termination of allegedly wrongful conduct to preclude injunctive relief, since the purpose of an injunction is to prevent future, as well as current, violations.[20] The Court found support for this theory in *United States v. W.T. Grant Co.*[21] in which the United States Supreme Court held that the mere voluntary cessation of allegedly illegal conduct by the defendant does not make a case moot or deprive a court of its power to grant injunctive relief unless the defendant can meet the "heavy burden" of showing that there is no reasonable expectation that the wrong will be repeated.[22]

Another independent consideration that influenced the Court's decision in *Wolf* was the fact that the alleged injury in *Wolf*—delay in receipt of replacement checks—was "capable of repetition, yet evading review."[23] The "capable of repetition, yet evading review"doctrine was first applied by the Supreme Court in *Southern Pacific Terminal Co. v. ICC,*[24] in which the ICC's motion to dismiss on mootness grounds was denied because, although the ICC order which the plaintiff sought to have enjoined had expired, the ICC could be expected to repeat the conduct that was allegedly contrary to the rights asserted by the particular named plaintiffs.[25]

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[16] 1975 Mass. Adv. Sh. at 877, 327 N.E.2d at 889.
[17] *Id.* at 878, 327 N.E.2d at 889.
[18] *Id.* The leading case was Spear v. H.V. Greene Co., 246 Mass. 259, 266-67, 140 N.E. 795, 797-98 (1923).
[19] 1975 Mass. Adv. Sh. at 878, 327 N.E.2d at 889-90.
[20] *Id.* at 879, 327 N.E.2d at 890.
[21] 345 U.S. 629 (1953).
[22] *Id.* at 632-33.
[23] 1975 Mass. Adv. Sh. at 878, 327 N.E.2d at 889-90.
[24] 219 U.S. 498 (1911).
[25] *Id.* at 514-16; *accord,* Moore v. Ogilvie, 394 U.S. 814, 816 (1969).

The United States Supreme Court recently extended the application of the doctrine of "capable of repetition, yet evading review" to class actions in which the defendants could not be expected to repeat conduct that allegedly was contrary to rights of the *named plaintiffs* but could be expected to act contrary to the rights of *other* class members. In *Sosna v. Iowa,*[26] a class action was held to be not moot even though the particular named plaintiff, who purported to represent a class barred from Iowa's courts by a durational residency requirement of Iowa, was herself no longer subject to the residency requirement since the required time for her own eligibility had passed.[27] The Court stated in *Sosna* that, although the controversy was no longer live as to Sosna, it remained "very much alive" for the class she had been certified to represent, and that since the issue sought to be litigated would always escape full appellate review at the behest of any single challenger, it should not inexorably become moot by the intervening resolution of the controversy as to the named plaintiff.[28] In *Wolf,* the Supreme Judicial Court concluded that the situation before it involved the same considerations as those that were present in *Sosna,* since the passage of time during an appeal process would likely moot the claim of any named plaintiff seeking a replacement check.[29]

In *Sosna,* the Supreme Court only extended the "capable of repetition, yet evading review" principle to class actions in which the named plaintiff's claim, even though subsequently mooted, was "live" at the time the class was certified.[30] As to the issue whether the "capable of repetition" doctrine would have applied if the named plaintiff's claim had become moot *before* the class was certified, the *Sosna* Court merely noted that whether certification could relate back to the filing of the complaint might depend upon the circumstances of the particular case and upon whether the issue would otherwise evade review.[31]

In *Wolf,* the trial court dismissed the case for mootness before reaching the issue of certification.[32] The Supreme Judicial Court in *Wolf* cited the presumptive validity rule under which courts have held that an action commenced as a class action retains that character until the court rules otherwise.[33] The Court did not expressly comment on the discussions in *Sosna* concerning certifying a class where the named plaintiff is not even a member because his claim has already become moot. The Court merely remanded the case to the superior court with

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[26] 419 U.S. 393 (1975).
[27] *Id.* at 401-02.
[28] *Id.*
[29] 1975 Mass. Adv. Sh. 878, 327 N.E.2d at 889-90.
[30] 419 U.S. at 402.
[31] *Id.* at 402 n.11.
[32] 1975 Mass. Adv. Sh. at 877, 327 N.E.2d at 889.
[33] *Id.;* Gaddis v. Wyman, 304 F. Supp. 713, 715 (S.D.N.Y. 1969), *aff'd sub nom.* Wyman v. Bowens, 397 U.S. 49 (1970).

a carefully worded reference to *Sosna* as indicating that "the [trial] Judge should have passed on the existence of a proper class before considering the question of mootness."[34] Presumably, the superior court will address the problem in the context of the analysis of *Sosna,* which shifts "the focus of examination [of whether a named plaintiff is entitled to litigate the interest of the class] from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.' "[35] Within that context, the court will undoubtedly keep in mind that the litigation contemplates that all members of the class will be bound by the judgment.[36] In determining whether the named plaintiff can fairly and adequately represent the class interests, the focus thus becomes whether there are possible conflicts of interest within the class and whether the class interests will be advocated competently.[37] In effect, the Supreme Judicial Court has accepted the view of some commentators that determination of class status is mandatory and must be decided prior to ruling on mootness.[38]

§13.5. Discovery: Equitable Bill. There is a tendency to assume that since one of the great benefits of the Massachusetts Rules of Civil Procedure is to promote uniformity,[1] all of the litigation tools of a practitioner are to be found in the Rules. The Supreme Judicial Court has recently reminded us, though, that a litigator may use tools apart from the Rules to help his case. In *Wolfe v. Massachusetts Port Authority,*[2] the Court reaffirmed the current availability of a bill of discovery. Despite a previous general hostility to the availability of such relief against a nonparty, the Court held that a bill of discovery is permitted against a public instrumentality not a prospective party to the suit if in the bill plaintiff alleges (1) an ongoing or contemplated cause of action for which information is needed and (2) sufficient facts to demonstrate the inadequacy of statutory interrogatories and the essentiality of the bill to the preparation of plaintiff's position in that cause of action.[3] Although the new Rules were not applicable to the case, this holding is consistent with these Rules because, as the Court specifically noted, the new Rules do not eliminate an " 'independent action against a person not a party for production of documents and things and permission to enter upon land.' "[4]

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[34] 1975 Mass. Adv. Sh. at 877, 327 N.E.2d at 889.
[35] 419 U.S. at 403, *quoting* FED. R. CIV. P. 23(a).
[36] MASS. R. CIV. P. 23(d).
[37] MASS. R. CIV. P. 23(a) & (b).
[38] 3B J. MOORE, FEDERAL PRACTICE ¶23.50, at 23.1101 (2d ed. 1975). *See generally* Bledsoe, *Mootness and Standing in Class Actions,* 1 FLA. ST. U.L. REV. 430 (1973).

§13.5. [1] See § 13.2 *supra.*
[2] 1974 Mass. Adv. Sh. 2187, 319 N.E.2d 423.
[3] *Id.* at 2192-93, 319 N.E.2d at 426.
[4] *Id.* at 2188 n.1, 319 N.E.2d at 424 n.1, *quoting* MASS. R. CIV. P. 34(c).

Discovery by bill in equity, particularly against nonparties, has been historically quite restricted.[5] In *Post & Co. v. Toledo, Cincinnati & St. Louis Railroad Co.,*[6] decided in 1887, the Court did permit a bill of discovery to be maintained against corporate officers who were not likely to be parties in the suit which the plaintiff was planning to bring against the corporation's shareholders.[7] The Court permitted the bill to be maintained on the ground that the plaintiff had a valid cause of action against the shareholders and was unable to obtain information identifying them by ordinary discovery methods.[8] In the next two cases in which the Court was asked to permit a bill of discovery, however, the Court adhered to the "general rule" that a person who is a stranger to or who might merely be called as a witness in the plaintiff's pending or prospective suit cannot be ordered to comply with the plaintiff's discovery requests.[9] The Court reasoned that relaxation of this rule would lead to abuses that the rule's establishment was intended to prevent, such as enabling the plaintiff to fish for information to determine if he might have any causes of action against persons other than the defendant named in the bill in equity for discovery.[10]

Seventy years after *Post,* however, in *MacPherson v. Boston Edison Co.,*[11] the Court did once again permit a bill of discovery to be maintained against strangers to pending litigation.[12] In *MacPherson,* though, the Court did not abandon the "general rule." Rather, a majority of the Court held that a trial court in its discretion can permit a bill of discovery to be maintained if it meets two conditions.[13] The bill must contain allegations that the usual discovery procedures are inadequate to obtain necessary information and that the bill meets the requirements that bills of discovery had to meet under ancient chancery practice.[14] The Court reaffirmed that such a bill was appropriate against nonparties who are corporate officers of a party defendant.[15] The Court also held that a bill for discovery against a stranger to litigation may be maintained if it merely seeks an order that the plaintiff be allowed to enter upon the stranger's premises to obtain discovery of property in which a *party* to the pending or prospective litiga-

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[5] *Id.* at 2189, 319 N.E.2d at 425.
[6] 144 Mass. 341, 11 N.E. 540 (1887).
[7] *Id.* at 350, 11 N.E. at 548-49.
[8] *Id.*
[9] American Security & Trust Co. v. Brooks, 225 Mass. 500, 502, 504, 114 N.E. 732, 732-33 (1917); Kelly v. Morrison, 176 Mass. 531, 536, 57 N.E. 1019, 1020 (1900).
[10] American Security & Trust Co. v. Brooks, 225 Mass. 500, 503-04, 114 N.E. 732, 733 (1917).
[11] 336 Mass. 94, 142 N.E.2d 758 (1957).
[12] *Id.* at 105-06, 142 N.E.2d at 766-67.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 105, 142 N.E.2d at 766-67.

tion has an interest.[16] The Court distinguished this situation from the cases in which bills seeking discovery of the property in which the *stranger* had an interest were dismissed on the grounds of the "general rule."[17]

The only authority that the present Court could cite in *Wolfe* to support exceptions to the hostility of Massachusetts courts to bills for discovery against nonparties was the *Post* case decided in 1887.[18] In *Post,* however, as previously noted, the individuals required to disclose facts concerning the litigation were corporate officers of a corporation whose shareholders were parties to the litigation. An exception to the general rule—prohibiting discovery from nonparties—had long applied to corporate officers in suits against corporations and a broader exception had been suggested to apply to agency relationships such as those that exist between corporate officers and shareholders.[19] In *Wolfe,* an agency relationship does not exist between the public instrumentality—the nonparty against whom discovery is being sought—and the prospective party defendant about whom the plaintiff is seeking information in his bill for discovery. Therefore, even a broad exception to the general rule for agency relationships is not applicable to the situation in *Wolfe.*

Despite the limited amount of precedent supporting its position, the Court had no difficulty in concluding that when the nonparty, from whom the discovery is being sought, is a public instrumentality, the nonparty should be compelled to furnish information to a prospective litigant that might help identify possible defendants.[20] The Court reasoned that, in prior decisions, bills of discovery against strangers to litigation were prohibited in order to protect the privacy of those persons.[21] Since a public instrumentality serves public ends and the public welfare, however, a rationale designed to protect the privacy of private individuals is inapplicable.[22] Therefore, the Court held that a plaintiff could obtain discovery from a public instrumentality if he "(1) has properly described an ongoing or contemplated cause of action for which information is needed and (2) has alleged sufficient facts to demonstrate the inadequacy of statutory interrogatories and the essentiality of the bill of discovery as an aid to the plaintiff's position in the court proceeding in the cause of action."[23] The Court noted that the instrumentality may object to the discovery of confidential or excessively numerous docu-

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[16] *Id.* at 104-05, 142 N.E.2d at 766.
[17] *Id.*
[18] *Wolfe,* 1974 Mass. Adv. Sh. at 2189, 319 N.E.2d at 425.
[19] American Security & Trust Co. v. Brooks, 225 Mass. 500, 502, 114 N.E. 732 (1917).
[20] 1974 Mass. Adv. Sh. at 2192-93, 319 N.E.2d at 426.
[21] *Id.* at 2190-91, 319 N.E.2d at 425.
[22] *Id.*
[23] *Id.* at 2192-93, 319 N.E.2d at 426.

ments at a hearing on the merits of the bill.[24] Resolution of that dispute would be in the discretion of the trial judge, who was specifically admonished to ensure that the bill addresses a "limited purpose" for which it provides a "practical and reasonable" discovery procedure.[25]

The opinion in *Wolfe* is consistent with a general objective of balancing the interest of justice to the parties to litigation against the freedom of nonparties to be left alone. Modern deposition practice has imposed more serious burdens on both individuals and corporations who are not parties to litigation. The narrow practical relief afforded here would appear not to significantly add to the burdens of nonparties and may prevent an injustice. The rule adopted by the Court, however, may not be limited in the future to public instrumentalities. The Court went out of its way to note that it did not intend to foreclose future consideration of similar equitable actions against nonpublic entities.[26] An astute litigator may accept this invitation.

§13.6. Summary Affirmance of Appeals. During the *Survey* year, the Appeals Court adopted Massachusetts Appeals Court Rule 1:28 (hereinafter Rule 1:28), which authorizes summary affirmance of appeals and which became effective on September 8, 1975.[1] Rule 1:28 permits a panel of justices of the Appeals Court to determine on its own motion and without entertaining oral argument in a civil case that no substantial question of law is presented by the appeal. Upon making this determination, the Appeals Court may, by written order, summarily affirm the judgment of the trial court.[2]

Soon after the Appeals Court began to use Rule 1:28, the Rule was challenged in *Sabatinelli v. Travelers Insurance Co.*[3] The Supreme Judicial Court held in *Sabatinelli* (1) that there was no constitutional or statutory bar to adoption of the Rule, and (2) that, although it "may not be the best way to achieve a desirable allocation of appellate judicial effort," its application to the appeal in the instant case was

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[24] *Id.* at 2193, 319 N.E.2d at 426.
[25] *Id.*
[26] *Id.* at 2191 n.2, 319 N.E.2d at 425 n.2.

§13.6. [1] MASS. APP. CT. R. 1:28. Rule 1:28 provides in full:

At any time following the filing of the appendix (or the filing of the original record) and the briefs of the parties on any appeal in accordance with the applicable provisions of Rules 14(b), 18 and 19 of the Massachusetts Rules of Appellate Procedure, a panel of the justices of this court, acting on its own motion and without entertaining oral argument, may determine that no substantial question of law is presented by the appeal and may, by its written order, affirm the action of the court below. Any such order shall be subject to the provisions of Rules 27 and 27.1 of the Massachusetts Rules of Appellate Procedure (effective September 8, 1975).

[2] *Id.*
[3] 1976 Mass. Adv. Sh. 384, 341 N.E.2d 880.

appropriate.[4] Therefore, despite the urgings of the Boston and Massachusetts Bar Associations, the Court declined to direct any change in the Rule at this time.[5]

Restrictions on oral argument have been imposed with accelerating frequency in recent years, particularly by federal courts of appeals.[6] The action of the Massachusetts Appeals Court is a limited but significant addition to the growing appellate chorus that rejects the right to an oral argument in every case. As is characteristic of rules precluding oral argument, Rule 1:28 raises some difficult policy questions.[7] However, unlike the typical summary affirmance rule, Rule 1:28 has been further tainted in the eyes of practitioners as a result of the procedure by which the Rule was adopted.

Rule 1:28 was adopted with the approval of the Supreme Judicial Court but without prior notice to the bar and without any prior opportunity for comment by interested persons. Consequently, members of the bar were not informed of the policy that caused the Appeals Court to adopt the Rule nor could they even be certain that the conflicting policies involved had been carefully weighed prior to the Rule's adoption.[8] Not until further appellate review was granted by the Supreme Judicial Court in *Sabatinelli* were briefs requested from the Massachusetts and Boston Bar Associations on the propriety of dismissal of an appeal without oral argument.[9] By requesting these briefs, the judiciary appeared to have finally recognized, although somewhat belatedly, the interest of the bar in evaluating the validity and wisdom of such action.

After considering the views of the bar, the Court did render a decision in *Sabatinelli* that is a cogent and thoughtful analysis of the policy factors involved. The Court sustained application of the Rule to the particular appeal[10] but strongly emphasized the importance of oral argument generally[11] and questioned whether the use of the Rule will actually result in the practical benefits upon which its adoption was premised.[12]

Rule 1:28 is in fact not as complete a departure as it might appear

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[4] *Id.* at 388, 395, 341 N.E.2d at 882, 885.

[5] *Id.* at 391, 341 N.E.2d at 883-84.

[6] See text at notes 26-31 *infra* and *Sabatinelli,* 1976 Mass. Adv. Sh. at 395 n.9, 341 N.E.2d at 885 n.9.

[7] For discussion of these policy issues, see text at notes 20-34 *infra.*

[8] A rule and screening procedure restricting oral argument was adopted in a similar method—*i.e.,* without prior notice to and without prior opportunity for comment by interested persons—by the United States Court of Appeals for the Fifth Circuit. Address by Bernard G. Segal, American College of Trial Lawyers 1974 Spring Meeting, Mar. 17-20, 1974 [hereinafter cited as Segal].

[9] *Sabatinelli,* 1976 Mass. Adv. Sh. at 386, 341 N.E.2d at 882.

[10] *Id.* at 395, 341 N.E.2d at 885.

[11] *Id.* at 391-93, 341 N.E.2d at 884.

[12] *Id.* at 395, 341 N.E.2d at 885.

to be from the tradition of hearing oral argument. First, the Rule only applies to civil cases in the intermediate appellate court.[13] Second, Rule 1:28 may only be used if the Appeals Court intends to *affirm* the trial court's decision.[14] Finally, even if oral argument is precluded at the Appeals Court level, a losing party may still request further appellate review by the Supreme Judicial Court, which request will be granted if "specifically authorized by three justices . . . for substantial reasons affecting the public interest or the interest of justice."[15] The availability of this latter safeguard, however, seems of little actual utility since three Supreme Judicial Court Justices must believe a summary affirmance by the Appeals Court to be so plainly wrong as to affect "the public interest or the interests of justice" before further appellate review can be granted.[16] Since limited court time is the rationale for elimination of oral argument at the intermediate appellate level, it is unlikely that Justices of the busy highest court will be able to find the time to give an independent complete review of the merits of a decision summarily affirmed. Furthermore, it is submitted that Rule 1:28 should stand or fall on its merits rather than upon the fact that there are safeguards to prevent it from being flagrantly abused.

Although the constitutionality of denying oral argument has been questioned in at least one jurisdiction,[17] since 1901, the Supreme Judicial Court has appeared to doubt that elimination of oral argument would be unconstitutional.[18] Federal courts have generally refused to hold that the opportunity for argument must always be given on appeal on the grounds, as succinctly stated by Judge Aldrich of the First Circuit, that "[d]ue process does not require oral argument in every case, as is made apparent by the Supreme Court's summary reversal procedure on petition for certiorari."[19] Therefore, the question whether oral argument ought to be barred in certain cases seems not to be one of constitutionality but one of wisdom.

Some United States Supreme Court Justices have emphasized that oral argument can be more effective than a brief. In a discussion of restrictions on oral argument, Mr. Justice Brennan stated, "I have had too many cases when my judgment of a decision has turned on what happened in oral argument, not to be terribly concerned for myself

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[13] MASS. APP. CT. R. 1:28.

[14] *Id.*

[15] G.L. c. 211A, § 11.

[16] *Id.*

[17] Bullock v. McGerr, 14 Colo. 577, 585-86, 23 P. 980, 983-84 (1890).

[18] Wall v. Old Colony Trust Co., 177 Mass. 275, 277, 58 N.E. 1015, 1016 (1901).

[19] Magnesium Casting Co. v. Hoban, 401 F.2d 516, 518 (1st Cir. 1968), *cert. denied,* 393 U.S. 1065 (1969). In FCC v. WJR, 337 U.S. 265 (1949), the Supreme Court stated in dictum that "the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances . . . . Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised." *Id.* at 276.

were I to be denied oral argument."[20] The late Justice Harlan put it even more broadly by describing oral argument as "perhaps the most effective weapon" of the advocate.[21]

Despite these voices, however, appellate courts, particularly at the intermediate level, continue to restrict oral argument. Their usual reason for doing so is "that the only thing that the judiciary can do to meet a problem of the ever-increasing case load is to manage its own time."[22] Some judges have even gone so far as to assert that in certain cases oral argument is "a complete waste of time."[23] The Supreme Judicial Court contented itself in *Sabatinelli* with noting that oral argument is not helpful to a court where there is "no conceivable viable appellate issue."[24] This statement, however, not only seems too true to dispute but also seems to somewhat beg the question. It is hard to quarrel with the argument that appellate judges are in the best position to determine for themselves what helps them to decide a case. The question is, though, whether an appellate court can really predict *prior* to hearing oral argument in a particular case that such argument will not reveal a viable appellate issue in that case.[25]

Even if appellate courts can predict with some degree of accuracy whether oral argument will be of value in deciding a particular case, one would hope that judicial self-restraint would make appellate courts reluctant to eliminate oral argument. History, however, demonstrates that placing oral argument on a lower level of judicial priorities

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[20] Remarks by Mr. Justice Brennan, Thirty-Fifth Annual Judicial Conference of the Third Judicial Circuit of the United States, Sept. 21, 1972 [hereinafter cited as Annual Judicial Conference].

[21] Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal,* 41 CORNELL L.Q. 6, 11 (1955). A forceful statement of the value of oral argument was made by Judge Wilkins in *Sabatinelli* as follows:

> Oral argument is an important part of the litigation of a case. It has been so regarded by numerous informed commentators. It permits the appellate advocate to present his client's case in a manner which often can be more persuasive, more incisive, and more effective than an appellate brief. Oral argument allows the advocate to deal immediately with questions and problems which are important to one or more of the Justices who hear the argument. Oral argument grants an opportunity for an attorney to summarize the issues which are before the court and why they should be decided in favor of his client. Often in appellate argument an opponent is forced to deal with an issue with which he has been unwilling or unable to contend in his brief.

1976 Mass. Adv. Sh. at 391-92, 341 N.E.2d at 884.

[22] Address by the Honorable John J. Gibbons, Circuit Judge, Annual Judicial Conference, *supra* note 20.

[23] *Id.*

[24] 1976 Mass. Adv. Sh. at 393, 341 N.E.2d at 884.

[25] The Court noted in *Sabatinelli,* however, how the dispute involved in that case—the meaning of clear language in two insurance policies—dramatized that the uselessness of oral argument can be predicted from a reading of briefs and records. *Id.* at 393 n.7, 341 N.E.2d at 884 n.7.

results in swift and dramatic elimination of oral argument in a vast number of cases. The experience in the federal system is instructive.

The United States Court of Appeals for the Fifth Circuit established a screening procedure by which it classified each case being appealed to it in one of four ways: a) frivolous, b) appeals where the case is determined by the judges to be of such a character as not to require oral argument, c) limited argument of fifteen minutes, and d) full thirty minutes argument.[26] During the first eighty days after this screening procedure was established, argument was denied by the Fifth Circuit in 30 percent of the appeals classified, only one of which was classed as frivolous.[27] Five years later, oral argument was given in only 43 percent of the appeals decided and, during one period, only 30 percent of the cases were argued orally.[28] This trend was concomitant with oral argument lasting thirty minutes a side in only 8 percent of all appeals or one out of every twelve cases.[29]

The Third Circuit's experience is even more dramatic. In this circuit, oral argument could be dispensed with or shortened by unanimous order of the panel assigned a case.[30] After this rule had been in effect for only 22 months, oral argument was denied in 50 percent of the appeals decided.[31]

The history of federal screening practices demonstrates how easy it is for courts to find ways to dispose of much of an appellate docket without oral argument. Yet, the benefits of eliminating oral argument appear in fact to be illusory. Commentators have characterized the time saved by eliminating oral argument as insignificant.[32] The Supreme Judicial Court has even suggested that the operation of Rule 1:28 might turn out to be more time consuming than the allowance of oral argument in all appeals, including insubstantial ones, would be.[33]

This history of the increasing elimination of oral argument in the federal court system raises another issue that should be considered in deciding whether the benefits of rules restricting oral argument actually do outweigh their disadvantages. Statements of eminent judges that an oral argument can change their minds and affect the outcome of a case confirm what it appears clients tend to believe—that some judges listen better than they read.[34] Sometimes the appearance to the

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[26] Murphy v. Houma Well Serv., 409 F.2d 804, 806 (5th Cir. 1969).

[27] *Id.* at 807 & n.8.

[28] Segal, *supra* note 8.

[29] *Id.*

[30] *Id.*

[31] *Id.* For a discussion of federal screening procedures, particularly in the Ninth Circuit, see *In re* Amendment of Rule 3, 440 F.2d 547 (9th Cir. 1970).

[32] Segal, *supra* note 8.

[33] *Sabatinelli,* 1976 Mass. Adv. Sh. at 395, 341 N.E.2d at 885.

[34] United States Court of Appeals for the Third Circuit, *In Re Oral Argument,* 1 PRACTICAL LAWYER 12 (1955).

public of the litigation process is as important as the way it actually works.

It is always hard for a lawyer to explain to a client why he lost the client's case. The burden becomes intolerable if the lawyer is forced to tell his client that he never even had an opportunity to argue that case. The Appeals Court should view any savings in judicial time in light of the public process in which it is engaged. Rule 1:28 must be used carefully.

§13.7. The New District/Municipal Courts Rules of Civil Procedure. Certainly the most profound change in the civil procedure of the Commonwealth to occur during the *Survey* year is the comprehensive revision and uniform codification of the rules of civil procedure governing practice in the Municipal Court of the City of Boston and the seventy-two district courts within the Commonwealth. These new rules, taking effect on July 1, 1975,[1] work far-reaching changes in the manner of practice of the majority of the lawyers in the Commonwealth. Made possible by comprehensive enabling legislation,[2] the new District/Municipal Courts Rules of Civil Procedure track, in large measure, the successful Massachusetts Rules of Civil Procedure in effect in the superior court since July 1, 1974. In so doing, the new Rules have vastly changed traditional district court practice. The old, nonentry system, whereby a case in the district court was commenced by delivering the writ and summons to the sheriff for service to be followed up with a declaration filed in court on or before the return day, is no more. Under the new Rules, an action is commenced, as in the superior court, by delivering or mailing to the clerk of the proper court a complaint and an entry fee.[3] Moreover, the entire panoply of pretrial discovery tools—depositions, production of documents and other things, entry upon land for inspection and other purposes, and physical and mental examination of persons—has been imported into district court practice.[4]

Yet, while the similarities between procedures in the superior and district/municipal courts now far outweigh the differences, some differences remain and these may have important consequences for the practitioner. This section will examine certain of these differences, highlighting those that would appear to have the most impact upon

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§13.7. [1] Acts of 1975, c. 377, § 164; Order of the Chief Justice of the District Courts and the Justices of the Municipal Court of the City of Boston, January 8, 1975.

[2] Acts of 1975, c. 377. This legislation ought to be read in conjunction with Acts of 1973, c. 1114, in order to trace the evolution of the statutory framework within which the Massachusetts Rules of Civil Procedure operate.

[3] DIST./MUN. CTS. R. CIV. P. 3. *Accord,* MASS. R. CIV. P. 3.

[4] DIST./MUN. CTS. R. CIV. P. 26-37. *Cf.* MASS. R. CIV. P. 26-37.

the preparation for and trial of cases.[5]

By design, the District/Municipal Courts Rules apply to a more limited class of cases than do the parallel Massachusetts Rules of Civil Procedure used in the superior court.[6] In the superior court, the Massachusetts Rules of Civil Procedure apply to all civil proceedings except ten enumerated, unique kinds of actions.[7] In the district and municipal courts "[n]o attempt is made to list the many . . . District Court civil proceedings to which [the] rules do *not* apply,"[8] and, instead, the District/Municipal Courts Rules apply only to "cases traditionally considered tort, contract, replevin, or equity actions, except small claims actions."[9] The result of this difference in approach would seem to be that certain causes of action over which both the superior and district/municipal courts have concurrent or related jurisdiction will be treated differently depending upon the forum involved.

For example, civil commitments of the mentally ill under section 8 of chapter 123 of the General Laws fall outside the new District/Municipal Courts Rules of Civil Procedures when such commitment is ordered by a district court.[10] Appeals from such orders under section 9 of chapter 123 of the General Laws, will be heard in the superior court pursuant to the Massachusetts Rules of Civil Procedure, however.[11] In the same fashion, a zoning appeal, if brought in the district court, will not be subject to the District/Municipal Courts

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[5] The first analytic comparison of the Massachusetts and District/Municipal Courts Rules appeared in Perlin & Connors, *New District Court Procedural Legislation,* 3 Massachusetts Lawyers Weekly 647 (June 30, 1975). It was revised and republished as Perlin & Connors, *New District Court Civil Rules and Related Legislation,* in RULES OF THE COURTS OF THE COMMONWEALTH § M at 1-22 (1975) [hereinafter Perlin & Connors]. It remains the best quick reference source of comparison of the two rules' systems.

[6] For ease of comparison, district court practice will here be compared only to superior court practice even though it is clear that the Massachusetts Rules of Civil Procedure apply not only to civil proceedings in the superior court but also to certain civil proceedings before a single justice of the Appeals Court and in the probate and housing courts, the land court, and the Supreme Judicial Court for Suffolk County (single justice session). MASS. R. CIV. P. 1.

[7] MASS. R. CIV. P. 81 (a)(1)-(10).

[8] Reporters Notes to Dist./Mun. Cts. R. Civ. P. 81.

[9] DIST./MUN. CTS. R. CIV. P. 81(a). The Reporters to the District/Municipal Courts Rules assert that the reference to "traditional considerations" is necessitated by the abolition of separate causes of action. Reporters' Notes to Dist./Mun. Cts. R. Civ. P. 81. *See* DIST./MUN. CTS. R. CIV. P. 2. The choice of phrase in District/Municipal Courts Rule 81 may be infelicitous, however, since, should the Legislature subsequently create by statute a cause of action sounding in tort but not heretofore known to our jurisprudence, it may be possible to argue that the District/Municipal Courts Rules do not apply to its adjudication, thus defeating the principle of uniformity.

[10] *See generally* Gallup v. Alden, 1975 Mass. Dist./Mun. Cts. App. Div. Adv. Sh. 113.

[11] MASS. R. CIV. P. 81. Proceedings in the superior court relative to the adjudication, commitment, and release of sexually dangerous persons are *not,* however, subject to the Massachusetts Rules of Civil Procedure. MASS. R. CIV. P. 81(a)(8).

Rules of Civil Procedure[12] but the same proceeding, brought in the superior court, most assuredly will be subject to the Massachusetts Rules of Civil Procedure.[13]

One change effected by the Massachusetts Rules of Civil Procedure that caused some consternation within the bar was the requirement that the process server make his return of service to the court.[14] The plaintiff's attorney who had requested service thus had no way of ascertaining whether service had been made without calling the clerk of the appropriate superior court. This problem has been ameliorated in the new District/Municipal Courts Rules by requiring the process server to make his proof of service not only to the court but also "to the party or his attorney, as the case may be, who has requested such service."[15] This addition in reality imposes no substantial burden on the process server and makes it easier for the plaintiff's attorney to determine that service has been made. Should the procedure prove successful in district and municipal court practice, we may yet see a revision of the Massachusetts Rules of Civil Procedure along the same lines.[16]

Subsequent pleadings and papers in a superior court action, if served first upon the opposing party or his counsel, must be filed in

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[12] Perlin & Connors, *supra* note 5, § M at 8.

[13] Pierce v. Board of Appeals of Carver, 1976 Mass. Adv. Sh. 572, 574, 582, 343 N.E.2d 412. In practice, it is as yet unclear how much difference it will make, other than in pre-trial discovery, whether a proceeding is governed by the new District/Municipal Courts Rules or not since District/Municipal Courts Rule 81(a) itself provides that"civil proceedings to which these rules do not apply shall follow the course of the common law, as near to these rules as may be, except that depositions shall not be taken, nor interrogatories served, save by order of the court on motion, with notice, for good cause shown." In the single justice session of the Supreme Judicial Court and in the superior court, even exempt proceedings tend to follow the procedures called for by the Massachusetts Rules of Civil Procedure. See, for example, the papers filed in Cappetta v. Orthodontics Limited, Inc., No. 75-191 (Supreme Judicial Court, Mar. 12, 1976) (proceeding pertaining to involuntary dissolution of a corporation and distribution of its assets—exempt under Massachusetts Rule of Civil Procedure 81(a)(6)).

[14] MASS. R. CIV. P. 4(f).

[15] DIST./MUN. CTS. R. CIV. P. 4(f).

[16] In passing, it is worth noting that although both the Massachusetts Rules of Civil Procedure and the District/Municipal Courts Rules of Civil Procedure permit service on an individual defendant in the Commonwealth by leaving copies of the summons and complaint at "his last and usual place of abode," MASS. R. CIV. P. 4(d)(1); DIST./MUN. CTS. R. CIV. P. 4(d)(1), G.L. c. 223, § 31, as most recently amended by Acts of 1975, c. 377, § 27, requires "in an action brought in the district court," the *mailing* of the summons and complaint by first class mail addressed to the defendant at his last and usual place of abode *in addition* to leaving it there as required by these two Rules. In addition, the Massachusetts Rules of Domestic Relations Procedure, governing proceedings for divorce, separate support and custody of minor children, and annulment and affirmation of marriage in the probate courts, *see* MASS. R. DOM. REL. P. 1, require service in hand to the defendant unless the defendant is not amenable to such service, in which case substituted service must be made in a manner approved by the court. MASS. R. DOM. REL. P. 4(d); PROB. CT. SUPP. R. 407.

the superior court "within a reasonable time" thereafter.[17] In the district and municipal courts, a pleading or paper served first upon the opposing party or his counsel must be filed in court "within five days thereafter."[18] One suspects, that although the superior court will enforce its rules in light of all the circumstances of a particular case, the promulgation of the District/Municipal Courts Rules will tend to fix a five-day period as the "reasonable time" within which a paper first served upon an opposing party or his counsel ought to be filed in the superior court. Surely the cautious practitioner will so interpret the Rules.

Although the substantive rules of pleading are now the same in both the superior and district courts, the District/Municipal Courts Rules require that any pleading that alleges a claim for monetary damages set forth "the amount of the damages so demanded."[19] No such requirement is found in the Massachusetts Rules of Civil Procedure and, indeed, where the ad damnum is stated, under superior court practice it may not be read to the jury.[20] In the district court, however, a precise statement of the amount of damages claimed is crucial to a determination of the rights of the parties to remove the case to the superior court. Since April 14, 1975, no case entered in the district courts on or after July 28, 1974, could be removed to the superior court before trial unless the ad damnum exceeded $4,000.[21]

The new District/Municipal Courts Rules introduced into district court practice, in the place of recoupment and setoff, the concepts of cross-claims between plaintiffs or defendants and counterclaims, both compulsory and permissive.[22] The advent of these various additional claims on the district court scene has necessitated a rethinking of the relationship of the superior and district courts and a litigant's right to choose his forum. This new relationship has been carefully worked out, and the rights of the litigant defined with fair precision in sections 103 and 104 of chapter 377 of the Acts of 1975.[23]

As has long been the law, if a plaintiff "elects to bring in any district court any action or other civil proceeding which he might have begun in the superior court, he shall be deemed to have waived a trial by jury and his right of appeal to the superior court, unless the said action or other civil proceeding is removed to the superior court," in

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[17] MASS. R. CIV. P. 5(d).

[18] DIST./MUN. CTS. R. CIV. P. 5(d).

[19] DIST./MUN. CTS. R. CIV. P. 8(a)(2). *Cf.* MASS. R. CIV. P. 8(a)(2).

[20] SUPER. CT. R. 7.

[21] Acts of 1975, c. 123, *amending* G.L. c. 231, § 104. Indeed, five and one half months earlier, the justices of the superior court had voted to remand to the district courts all civil cases where there was no "reasonable likelihood that recovery [would] exceed four thousand ($4,000) dollars if the plaintiff prevails." Super. Ct. R. 29.

[22] DIST./MUN. CTS. R. CIV. P. 13.

[23] Acts of 1975, c. 377, §§ 103-04, *amending* G.L. c. 231, §§ 103-04.

which case the plaintiff has the same rights as he would have had had he originally commenced the action in the superior court.[24] Thus, if the plaintiff commences in a district court an action in which he seeks monetary damages in the amount of $10,000, he has waived the right to trial by jury and the right to appeal to the superior court from an adverse finding. Nevertheless, since the amount of the ad damnum is $10,000, the defendant has the right to remove the action to the superior court,[25] in which case the plaintiff can, at that time, claim a trial by jury. Conversely, if the plaintiff brings an action in the district court and claims damages in the amount of $2,000 (nonremovable) and the defendant asserts a permissive counterclaim seeking damages in the amount of $10,000 (removable), then the plaintiff, but not the defendant (who chose to bring his permissive counterclaim in the district court), can remove the entire action to the superior court.[26] In order to remove a case to the superior court, the party against whom a claim in excess of $4,000 is asserted, must request a trial in the superior court within 25 days of the service upon him of the pleading setting forth the claim in which recovery in an amount in excess of $4,000 is asserted.[27]

A special case is presented by the nature of the compulsory counterclaim. If a defendant does not plead a compulsory counterclaim, he will lose it.[28] Consequently, the defendant who must plead a compulsory counterclaim to an action brought by the plaintiff in a district court is given the right himself to remove the entire action to the superior court if the amount of his compulsory counterclaim exceeds $4,000.[29] Naturally, the general twenty-five-day time period for removal, running from the date of the service of the claim giving rise to the right to remove, does not apply to a compulsory counterclaim, where removal is sought by the defendant making the claim. Accordingly, a different time period is established by the statute to govern the right to remove in such instances. The defendant who makes a compulsory counterclaim must file his claim of trial by the superior court no later than five days after the time his answer is due.[30] Unless extended by order of the court, the defendant in a district court action has twenty days after service to file his answer.[31] Thus, the defendant who is filing a compulsory counterclaim actually has a total of twenty-five days—and longer if he gets a court approved extension of

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[24] G.L. c. 231, § 103, *as amended by* Acts of 1975, c. 377, § 103.
[25] *Id.* § 104, *as amended by* Acts of 1975, c. 377, § 104.
[26] *Id.* § 103, *as amended by* Acts of 1975, c. 377, § 103.
[27] *Id.* § 104, *as amended by* Acts of 1975, c. 377, § 104.
[28] DIST./MUN. CTS. R. CIV. P. 13(a); Reporters Notes to MASS. R. CIV. P. 13. *See* Buckley v. John, 314 Mass. 719, 721, 51 N.E.2d 317, 319 (1943).
[29] G.L. c. 231, § 104, *as amended by* Acts of 1975, c. 377, § 104.
[30] *Id.*
[31] DIST./MUN. CTS. R. CIV. P. 12(a)(1).

time to answer—before he must request removal to the superior court.[32]

The amended statutes contain an anomaly, however. Although it is made very clear that a plaintiff, who is the victim of a cross-claim in excess of $4,000 pleaded by a coplaintiff, has the right to remove the entire action to the superior court,[33] no such express right of removal is given to a defendant who finds himself on the receiving end of a cross-claim by a codefendant in excess of $4,000. Naturally, cross-claims between codefendants are far more common than are cross-claims between coplaintiffs, who may be expected to have agreed at least upon the bringing of the original suit. It would indeed be incongruous if section 104 of chapter 231 of the General Laws were to be read as permitting the plaintiff who is the subject of a cross-claim in excess of $4,000 to remove, while denying the same right to the defendant in the same position. This result need not follow, however, since the statute provides that "[a]ny other party . . . may, provided that the amount of the claim against such other party . . . exceeds four thousand dollars," remove the action to the superior court.[34]

Admittedly, this reading ignores the express grant of such rights to both the plaintiff and the defendant in the circumstances discussed above. Under the *expressio unius exclusio alterius* rule of statutory construction, the use of the phrase "any other party" could give rise to an argument that the "other party" referred to in section 104 is limited to third-party defendants and does not refer to a defendant who is the subject of a cross-claim.[35] Nonetheless, a more equitable reading of the statute would seem to require that this argument be rejected, and it is unfortunate that the draftsmanship is so oblique as to lend itself to this construction.

Once it is finally determined that the action will proceed first to trial in the district court, consideration must be given to the unique aspects of trial preparation under the District/Municipal Courts Rules. For example, although the district courts are open on Saturdays, intermediate Saturdays are nevertheless excluded in computing the time for taking any action required to be accomplished in less than seven days under the Rules. Saturdays are included when the time allowed for taking any action is seven days or more and, even though the district court may be open on Saturday, if the last day within which action must be taken falls on a Saturday, the period of time within which action is permitted to be taken runs until "the end of the next

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[32] The defendant is allowed the normal twenty days to answer plus five days before he must remove, or a total of twenty-five days.

[33] G.L. c. 231, §§ 103, 104, *as amended by* Acts of 1975, c. 377, §§ 103, 104.

[34] *Id.*, § 104, *as amended by* Acts of 1975, c. 377, § 104.

[35] *Cf.* Harborview Residents' Comm. Inc. v. Quincy Housing Authority, 1975 Mass. Adv. Sh. 2433, 2443, 332 N.E.2d 891, 895.

day which is not a Saturday, a Sunday, or a legal holiday."[36]

The careful practitioner will also note the substantive differences from superior court practice that are provided in the District/Municipal Courts Rules for pre-trial discovery. One such change reflects the fact that the jurisdiction of the superior court is state-wide whereas the jurisdiction of a particular district court is limited to its judicial district. Accordingly, the District/Municipal Courts Rules provide that, in the case of depositions taken outside the judicial district in which the action is pending, disputes arising during the course of the taking of the deposition—*e.g.* the refusal of the witness to answer a question upon the grounds of an assertion of privilege, the need for an immediate protective order to prevent harassment—may be brought before the district court judge in the judicial district in which the deposition is being taken *or* before the district court in which the action is pending.[37] This mechanism not only provides an expedient for quick resolution of disputes during the course of the deposition, but also provides the party seeking court action with the choice of a forum. Naturally, the party seeking to compel an answer refused during the course of a deposition may wish to review the entire transcript and then make his motion before the judge who may ultimately be expected to hear the case, on the theory that the familiarity of that judge with the case will aid the party seeking the order.[38]

Further, it ought to be noted that, unlike superior court practice, which requires seven days notice to the defendant upon an application for judgment by default for failure to answer interrogatories,[39] district court practice now permits the clerk to enter a final judgment against the defendant, upon the request of the plaintiff, immediately after the thirty-day conditional default period provided for by Dis-

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[36] DIST./MUN. CTS. R. CIV. P. 6(a).

[37] DIST./MUN. CTS. R. CIV. P. 37(a)(1).

[38] This procedure serves well when a party refuses to answer a question put to him in a deposition. What of a nonparty witness, however, whose only connection with the lawsuit is the information he is called upon to give in his deposition? Suppose such a nonparty witness lives in Williamstown and his deposition is taken there in a case pending in the District Court of Nantucket. If he should refuse to answer a question on the ground that it invades his own relationship with his attorney, it seems onerous to require him to defend such a refusal out on Nantucket when without prior approval of the court, he could not have been subpoenaed to give his testimony at a deposition on Nantucket. DIST./MUN. CTS. R. CIV. P. 45(d)(2). Perhaps an adequate answer is found in District/Municipal Courts Rule 26(c) which permits the Williamstown witness, at the time he receives the subpoena notifying him of his deposition, to move for a protective order in the District Court of Williamstown to the effect that, notwithstanding District/Municipal Courts Rule 37(a)(1), in view of the distance from Williamstown to Nantucket, disputes arising in the course of his deposition shall be resolved in his local court.

[39] MASS. R. CIV. P. 55(b)(2).

trict/Municipal Courts Rule 33(b) has expired, "when the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain."[40]

Finally, although the Massachusetts Rules of Civil Procedure have made it unnecessary to take formal exception to rulings or orders of the court during the course of trial,[41] it is still necessary in district court practice to make a request for a report to the appellate division of the district courts at the time a district court judge rules upon the admission or exclusion of evidence in a manner contrary to that sought by the party seeking a report. It is also necessary for the party seeking a report to reduce his request to writing and file it with the clerk of the appropriate district court "within 5 days after the hearing of all the evidence."[42] The continuation of this cumbersome procedure is necessitated by the absence of any reliable system of transcribing the evidence in most of our district court hearings. It is therefore necessary that the court's attention be specifically focused upon those matters that a litigant wishes to make the subject of an appeal and that there be some written evidence of contested rulings upon which an appeal can be based. It is virtually impossible to overstate the importance of this requirement in district court practice. It is not enough to merely object to the admission of evidence. If the court rules, after counsel's objection, that the evidence is to be admitted nevertheless, it is absolutely necessary for counsel to make the further statement, "Your Honor, I respectfully request a report of that ruling." Failure to present such a request for a report to the trial judge is fatal to the right to prosecute an appeal asserting error in that ruling.[43] Until a more comprehensive and accurate system is devised for preparing a transcript of district court proceedings, therefore, the "request for a report" made orally immediately following a judge's ruling upon the admission or exclusion of evidence will be a feature of our district court practice.

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[40] DIST./MUN. CTS. R. CIV. P. 55(b)(1).
[41] MASS. R. CIV. P. 46.
[42] DIST./MUN. CTS. R. CIV. P. 64(a).
[43] Murphy v. William C. Barry, Inc., 295 Mass. 94, 97, 3 N.E.2d 214, 215 (1936).