

NOTICE OF PUBLIC HEARING

THURSDAY, NOVEMBER 20, 2003 AT 9:30 A.M.

**IN RE: PROPOSED REVISION TO SUPREME COURT
ARTICLE 1, RULES OF APPELLATE PROCEDURE**

Supreme Court

In re: Proposed Revisions to Supreme Court :
Article I, Rules of Appellate Procedure :

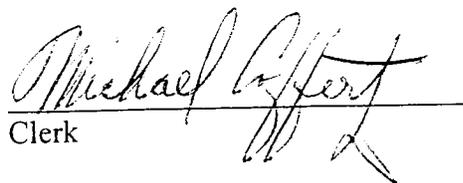
ORDER

The Supreme Court Bench/Bar Rules Subcommittee has submitted to this Court a number of proposed revisions to the Rules of Appellate Procedure and to our Notice of Appeal form. Prior to adopting these revisions, we believe that the members of the Bar should have an opportunity to offer comment thereon.

Accordingly, the subcommittee's proposed revisions to the Rules of Appellate Procedure are assigned for hearing to *Thursday, November 20, 2003*, at 9:30 a.m. All persons interested in offering comment on any of the proposed revisions may do so at that time. Notice of intent to present oral argument at the hearing should be submitted to the Supreme Court clerk's office on or before *Monday, November 17, 2003*. Persons desiring to submit written comment may also do so on or before that date. Copies of the subcommittee's proposed revisions may be obtained at the Supreme Court clerk's office.

Entered as an Order of this Court this *16th* day of *September 2003*.

By Order,


Clerk

MEMORANDUM

To: Rhode Island Supreme Court

From: Supreme Court Bench/Bar Rules Subcommittee

Date: September 9, 2003

Re: Proposed Revisions to Rhode Island Supreme Court Rules of Appellate Procedure

This memorandum summarizes the substantive changes that the Supreme Court Bench/Bar Rules Subcommittee has proposed to the Supreme Court Rules of Appellate Procedure and the Notice of Appeal form.¹

Rule 6. Certification of questions of law. Rule 6(f) has been amended to provide that, in cases in which the Supreme Court has been asked to address a certified question of law, the proceedings shall be those provided in the Rules governing Rule 12A statements, briefs and arguments as the Court may order. Rule 6(f) also has been amended to make clear that, in such cases, the plaintiff shall file the opening brief, the defendant files the responding brief, and the plaintiff may file a reply brief. Any party wishing to seek a modification of these briefing requirements must move for such relief with the Court.

Rule 7. Trial court orders for protection of parties pending appeal or petitions for review. Rule 7 has been amended to set forth the procedure for the trial court to appoint counsel for criminal appeals in the Supreme Court. Specifically, Rule 7(b) has been added to provide that the Superior, Family, or District Court may appoint counsel solely for purposes of perfecting the appeal and ensuring that all necessary requests for extension are filed. When the trial court makes an appointment for purposes of the appeal, the appointment must come from the panel of attorneys available for appointment in this category in the Supreme Court. After the appointment is made, the appointment terminates once the appeal is docketed in the Supreme Court. Thereafter, if appointed counsel wishes to provide appellate services to the defendant after the appeal is docketed, counsel must request appointment by the Supreme Court. Hence, the Supreme Court retains the ultimate authority to determine whether that counsel will continue to prosecute the appeal.

¹ The members of the Subcommittee are as follows: The Honorable Robert Flanders, Martha Newcomb, Chief Staff Attorney, Appellate Screening Unit, Professor Jessica Elliott of the Roger Williams University School of Law, and Attorneys Thomas Bender, Thomas Dickinson, John Gyorgy, Lauren Jones, Brian Newberry, Paula Rosin, David Wollin (chair) and Lauren Zurier.

Rules 10(c) and 11(f). The record on appeal; Transmission of the record – Jurisdiction of the Supreme Court and trial court over appeals. Rules 10(c) and 11(f) were amended to address a concern that, once an appeal or petition for review is docketed in the Supreme Court when there are further proceedings contemplated below, all activity stops in the trial court until the appeal is resolved or the matter is remanded. This can occur, for instance, when a petition for writ of certiorari is granted on an interlocutory ruling or the trial court grants judgment on some but not all the claims (or to some parties but not others) pursuant to R.I. R. Civ. P. 54(b). In these circumstances, the Committee believed the trial court proceedings should not automatically cease until the appeal is resolved, but rather the trial court should decide in the first instance whether a stay is warranted.

Rule 10(c) and Rule 11(f) address this situation. Rule 10(c) describes the record on the appeal when further proceedings are expected in the trial court. Specifically, Rule 10(c) provides that when further proceedings are pending in the Superior, Family, or District Court over aspects of the case not involving the appeal or petition for review, certified copies of the original papers and exhibits filed in the trial court as designated by the parties, along with the transcript and a certified copy of the docket entries, shall constitute the record on appeal. Within twenty (20) days after filing the notice of appeal or petition for review, the appellant must arrange for the clerk to certify copies of such parts of the original records and exhibits as he or she deems necessary for inclusion in the record. Unless the entire record is to be included, or the parties agree otherwise in writing filed with the court, the appellant must file and serve on the appellee a description of the parts of the original papers and exhibits which the appellant intends to include in the record and a statement of the orders or rulings that he or she intends to appeal. If the appellee deems other parts of the original papers and exhibits to be necessary, he or she must immediately arrange for the clerk to certify such parts or procure an order from the trial court requiring the appellant to do so.

Rule 11(f) provides that from the time of the docketing of an appeal in the Supreme Court, the Court has the exclusive jurisdiction to supervise the further course of the appeal and enter such orders as may be appropriate. However, notwithstanding this provision, if further proceedings are pending in the lower court over aspects of the case not involved in the appeal or petition for review after the case has been docketed, any party wishing to seek a stay of the lower court proceedings must proceed in the first instance to the trial court, or thereafter by motion to the Supreme Court, which shall determine if a stay is warranted pending the resolution of the appeal. Thus, in these circumstances where further proceedings are contemplated in the trial court, the presumption is that those lower court proceedings will continue while the appeal is pending, unless a party seeks a stay first in the trial court or thereafter by motion to this Court.

Rule 11(f) further provides that if the original papers and exhibits filed in the trial court are required for appeal in addition to the certified copies, the Supreme Court may order that such original papers and exhibits be transmitted to the Court.

Rule 12A. Statement of the case; single justice conferences; hearing panels. Rule 12A(1) and (2) have been amended to require each party to file a Supreme Court Summary Report Form provided by the clerk's office with their Rule 12A Statement or Counter-Statement, unless all the parties file a joint Summary Report Form in accordance with Rule 12A(1). The

Summary Report Form, which gives an overview of the case and issues on appeal, is expected to be approved by the Supreme Court Bench/Bar Rules Committee in the near future.

In accordance with the changes in Rules 10(c) and 11(f), Rule 12A(3) has been amended to specify that the Rule 12A conference is designed to determine not only the manner in which the appeal, cross-appeal or petition for review are to proceed, but to consider whether proceedings over aspects of the case not involved in the appeal, cross-appeal or petition for review are contemplated or pending below while the matter is pending in the Supreme Court. In addition, the Rule has been amended to provide that in civil matters, counsel for each party must confer in advance of the conference with his or her client and obtain authority to settle the matter, if possible.

Rule 12A(5) has been added to make clear that the Rule 12A statements and counterstatements shall conform to the form set forth in Rule 18(b), which sets forth the form all papers filed with the Court must take. Rule 18(b) provides that all papers filed with the Court shall be eight and one-half (8½) by eleven (11) inches and double spaced, using Times New Roman font or a font of similar legibility and at least 12 as the font size; footnotes are to be single spaced and also use Times New Roman font or a font of similar legibility and at least 12 as the font size. Any papers failing to comply with the foregoing requirements may be rejected.

Rule 13. Extraordinary writs. Rule 13(a) has been amended to make clear that, in situations in which a notice of appeal and a petition for writ of certiorari are filed, the party filing the petition must indicate in the petition whether a notice of appeal has been filed with the Court and why that is not sufficient to address the appellate issues and that a writ must issue instead.

Rule 13(c) was added to make clear that the petitioner may file a reply memorandum within ten (10) days after service of the memorandum in opposition, and that no party may file any further memorandum or brief without the prior approval or direction of the Court. It was the consensus of the Committee that a reply memorandum would conform to the usual briefing rules of having an opening brief, a responsive brief and a reply brief, in which the petitioner has the last word.

Rule 13(d) has been added to make clear that the petitions for writ of certiorari and opposition papers shall conform to the form set forth in Rule 18(b).

Rule 16. Briefs. Rule 16 has been amended in several significant respects. The Committee believed that the appellee should have the same amount of time to file his or her brief as the appellant. Accordingly, Rule 16(b) has been amended to provide that the appellee has forty (40) days, rather than twenty (20) days, after the brief of the appellant has been filed to file his or her brief.

Additionally, the Committee believed that the appellant should have more than five (5) days to file a reply brief, and thus Rule 16(c) has been amended to allow the appellant twenty (20) days to file a reply. However, Rule 16 has been amended to specify that reply briefs shall not exceed twenty-five (25) pages; previously, the reply brief could be fifty (50) pages long.

Thereafter, no party may file any further or supplemental brief or post-argument memorandum without the prior approval or direction of the Court.

There is an exception contained in Rule 16(e), which is patterned after the Federal Rules of Appellate Procedure. Rule 16(e) provides a mechanism for a party to cite to supplemental authority after the party's briefs have been filed or after oral argument has occurred, but before a decision has been rendered. That Rule provides that if pertinent and significant authorities come to a party's attention after the party's briefs have been filed, or after oral argument but before decision, a party may promptly file a document entitled "Citation of Supplemental Authority," with a copy to be served on other parties, setting forth the citations. If an authority is not available in a national reporter, a copy must be included and served on all parties. The document must state without argument the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. Any response must be filed within ten (10) days and must be similarly limited. No reply is allowed.

Rule 16(d) has been added to set forth the briefing procedure in a case involving a cross-appeal or cross-granting of a writ of certiorari. In a small departure from the usual briefing procedures set forth above, Rule 16(d) provides that, unless otherwise ordered, the party filing the first notice of appeal or petition for writ of certiorari is the appellant or petitioner and shall file the opening brief, the party filing the second notice or petition is the appellee or respondent and shall file a responding brief which also addresses the issues raised in the cross-appeal or cross-petition, the appellant or petitioner may file a reply brief, and the appellee or respondent who has cross-appealed may file a brief in reply to the appellant's or petitioner's response to the issues presented by the cross-appeal or cross-petition. If notices or cross-petitions are filed on the same day, the plaintiff in the proceeding below is the appellant or petitioner. Thereafter, no party may file any further or supplemental brief or post-argument memorandum without the prior approval or direction of the Court. Any party wishing to seek a modification of the foregoing briefing requirements must move for such relief prior to the Rule 12A single justice conference.

Rule 16(f) governing the form of briefs has been simplified so as to refer to Rule 18(b), which as noted above sets forth the form all papers filed with the Court, including briefs, must take.

Rule 16(i), patterned after the Federal Rules of Appellate Procedure, adds a new provision entitled, "References to Parties," which provides that in briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the trial court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the landlord," "the tenant."

Lastly, Rule 16 has been amended to delete the provision concerning motions to affirm, which the Committee believed was unnecessary and rarely, if ever, used in current practice.

Rule 17. Appendix to the briefs. Rule 17 has been amended to make appendices more user-friendly for the Court. Rule 17(a) now has additional language which provides that, in civil cases, the appendix shall have a table of contents, pages separately numbered and appropriate

demarcation such as tabs or colored paper separating discrete sections to assist the Court to locate portions of the record referenced in the briefs. When portions of a transcript are included in the appendix, counsel must ensure that the cover sheet of the transcript volume and the index of witness names are included, together with sufficient pages assembled in sequence to enable the Court to read the cited passages in context. In criminal cases, the foregoing provisions concerning separate pagination of the appendix is not mandatory, provided that the parties employ alternative methods of organizing the appendix in a form which provides substantially equivalent assistance to the Court in locating portions of the record referenced in the briefs.

Rule 18. Filing, form, service and notice. As noted above, Rule 18(b) sets forth the form all papers filed with the Court, including briefs, must take.

Rule 19. Appearances. Rule 19 has been amended to reflect the Court's recent order that attorneys who are not appointed by the Supreme Court in the ordinary course following docketing of an appeal, and prior to the performance of appellate services, shall not be appointed as appellate counsel *nunc pro tunc* and will not be compensated for any services performed in advance of their appointment, in the absence of extraordinary circumstances.

Rules 20 and 18A. Computation and extension of time; Sanctions for failure to file statements of the case, counter- statements and briefs in accordance with Rules 12A and 16. Many members of the Committee were of the belief that there are too many motions for extension routinely filed and granted, even in the face of objections, and that there should be a limit to the number of extensions the clerk may grant before the Court's permission is required.

Hence, Rule 20(b) governing extensions of time has been amended to provide that the Supreme Court clerk's office may, upon motion, grant only one 30-day extension. Thereafter, the clerk may, upon motion, grant an additional 30-day extension (or two (2) additional 30-day extensions in criminal cases) unless an objection is filed within seven (7) days of the filing of the motion to extend, in which case the motion must be resolved by the Court. No further extensions can be granted unless by order of the Court for good cause shown. (This Rule does not apply to petitions for reargument, which are governed by Rule 25).

Rule 20(c) has been added as an exception in criminal cases in which full briefing is ordered. Specifically, when a party in a criminal case believes in good faith that more than three (3) requests for extension of time will be required in a matter in which full briefing is ordered, the parties, on motion after consultation, may establish a briefing schedule in advance, but subject to approval by the Court.

If a party fails to file a Rule 12A statement or a Rule 16 brief on time, the sanctions of Rule 18A are applicable. There are two major changes to this Rule. First, the Rule eliminates the grace period – 10 days for Rule 12A Statements/Counter-Statements and 30 days for briefs – before a conditional order of dismissal of the appeal could be entered. Second, the Rule has been amended to provided that, if a party fails to file the appropriate document in the Supreme Court by the deadline, the clerk must (rather than may) enter a conditional order of dismissal, subject to reinstatement if the document is filed within ten (10) days (rather than five (5) days) after the entry of the order.

Rule 20(a) has also been amended to provide that in computing time under the Rules, if the last day of the period is a Saturday, it shall not be included.

Rule 24. Arguments. The Committee was of the belief that, in cases on the show cause calendar where oral argument is allowed, the appellant or petitioner should be allowed a brief period of two minutes for rebuttal. The Committee concluded that rebuttal is necessary and appropriate in many cases, and that the overall addition of time (ten minutes assuming five cases on the show cause calendar) would not be a significant lengthening of oral argument. Thus, Rule 24(b) has been amended to allow the appellant or petitioner an additional two (2) minutes for rebuttal in show cause cases where argument is allowed.

Rule 25. Reargument. Rule 25 has been amended to provide that petitions for reargument for causes heard and decided must be filed within ten (10) days (rather than five (5) days) after filing of the decision. The Committee believed that five (5) days was not sufficient time to file a petition, particularly when a decision is rendered on a Thursday or Friday. Likewise, the memorandum in opposition would be due ten (10) days (rather than five (5) days) after receipt of the petitioner's papers.

Rule 28. Motions. Rule 28(c) has been added to allow the moving party to file a reply memorandum in support of a motion. However, no party may file a supplemental memorandum without prior approval or direction of the Court.

Further, Rule 28(d) has been added to provide that, if the Court grants a motion to expedite an appeal, the moving party shall not be granted an extension to file any briefs without the Court's express permission. Further, the provisions of Rule 20(b) concerning extensions of time do not apply in this circumstance.

Rule 28 has also been amended to add a subdivision (e) which provides a mechanism for filing papers under seal. This new provision provides that a party wishing to file any papers under seal shall move for permission at the time the papers are filed, and separate papers will be conditionally filed under seal pending order of the Court.

Rule 29. Taking out transcripts and exhibits. The Committee believed that Rule 29 governing the removal of transcripts should provide a mechanism, in limited circumstances and subject to Court approval, for taking out of exhibits as well. As a result, Rule 29(c) was added to provide that a party may take out exhibits only with leave of Court granted upon motion, which sets forth precisely the exhibits the party wishes to remove, the reason for the withdrawal, and the duration of the removal, as well as any measures that will be taken to safeguard the integrity of the exhibits.

Rule 29 has also been amended to lengthen the time a party in a criminal case may remove a transcript. Specifically, Rule 29(b) provides that in criminal cases, the clerk's office may, upon motion, grant one three-month extension of the time that a party has to take out transcripts, provided that the party make the transcripts available to the Court or opposing

counsel on an “as-needed” basis. Thereafter, a party must, upon motion, seek permission from the Court for an additional three-month extension.

Rule 33. Stenographic recording and taking of testimony in the Supreme Court.

Rule 33 has been amended to specify that the Supreme Court does not record its proceedings. If a party desires to preserve a stenographic record of the proceedings, the party must move in advance of the proceedings for permission to employ a certified court stenographer at his or her own expense.

Notice of Appeal Form. The notice of appeal form has been edited, after consultation with the clerks of the Superior Court and the Supreme Court, to reflect the proposed changes and certain requirements in the existing rules, and to delete unnecessary information.

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