POSSIBLE, BUT NOT LIKELY: EXPEDITED APPEALS IN MASSACHUSETTS

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I. INTRODUCTION

For all practical purposes, Massachusetts does not have an explicit procedure for expediting the appellate process. Although the state's rules of procedure allow either the Massachusetts Supreme Judicial Court[1] or the Massachusetts Appeals Court to order an expedited appeal, and to develop a procedure for then processing that appeal, this option is rarely used. Massachusetts does, however, have two other processes that may expedite review on appeal—direct review by the supreme judicial court, which enables the parties to bypass the appeals court, and the single-justice proceeding, which can provide the equivalent of expedited appellate review in some cases—both of which are used more often than the alternate procedure. This article will address all three means of expediting review in Massachusetts.

II. THE RULE 2 PROCEDURE

Appellate Rule 2, entitled "Suspension of the Rules," states:

> In the interest of expediting decision, or for other good cause shown, the appellate court or a single justice may,

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1. The supreme judicial court, like the highest courts in many other states, controls its own docket, as it must hear only appeals from capital murder convictions, appeals from single-justice proceedings, and questions certified to it by the federal courts. Joseph R. Nolan, *Massachusetts Practice—Appellate Procedure* vol. 41, at 139 (West 1999 & Supp. 2001).

> except as otherwise provided in Rule 14(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. Such suspension may be on reasonable terms.[2]

This rule provides flexibility in the appellate process, and allows the court or a single justice to relax or suspend the rules when necessary.[3] Note, however, that trial judges are not similarly empowered, and even appellate judges are without authority to extend the time for filing an appeal beyond the one-year limitations period.[4]

Now firmly engrained in Massachusetts practice, this rule was part of a series of new rules that went into effect in 1974.[5] One of the purposes behind their enactment was simplifying the appellate process; the rules were intended to eliminate "many of the previous rigid statutory time limitations which often served as fatal or near-fatal booby traps for inexperienced or unwary practitioners taking a case from the trial court to the appellate court."[6] As a result, the supreme judicial court has pointed out that the rules should be construed to meet the goals of simplifying procedure and eliminating rigid statutory time limits.[7] Thus, Rule 2 can be used to expedite an appeal,[8] although it is rarely used for that purpose.[9]

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2. Mass. R. App. P. 2 (West 2002).

3. *See* Reporters' Notes to Mass. R. App. P. 2 (indicating that the rule tracks Federal Rule of Appellate Procedure 2).

4. *Id.*; *see also Giacobbe v. First Coolidge Corp.*, 325 N.E.2d 922, 927 (Mass. 1975) (noting that "the only absolute limitation" on appeals courts and single justices is that they cannot "enlarge the time for filing a notice of appeal beyond one year from the date of entry of judgment or order sought to be reviewed").

5. *Giacobbe*, 325 N.E.2d at 926.

6. *Id.*

7. *Id.* at 926-927 (recognizing that a single justice, unlike a trial judge, has authority to extend the statutory time period for paying the estimated cost of reproducing the record on appeal).

8. *See e.g. In re Spring*, 405 N.E.2d 115, 124 (Mass. 1980) (indicating that an Appeals Court justice can shorten time limits on appeal under Massachusetts Rule of Appellate Procedure 2).

9. For an example of a case where an expedited appeal was allowed, see *Guardianship of Mason*, 669 N.E.2d 1081 (Mass. App. 1996), in which the appointment of a guardian for a terminally ill woman and the entry of a "do not resuscitate" order were at issue.

Another appellate rule similarly permits the appeals court to decide an appeal on the briefs, without oral argument.[10] This process, known as summary disposition, expedites an appeal to the extent that the parties do not have to wait for oral argument. When invoked by the court, however, it results in the parties' losing the opportunity to present their cases at oral argument.[11] Although Rule 1:28 applies by its terms to all cases, the standard for its application is that there be "no substantial question of law . . . presented by the appeal or that some clear error of law has been committed which has injuriously affected the substantial rights of an appellant."[12] That language substantially limits the range of cases to which the rule will apply, so it can in theory be invoked in fewer cases than can Appellate Rule 2.

III. DIRECT REVIEW BY THE SUPREME JUDICIAL COURT

Under both statutory and rule authority, cases may be appealed directly to the supreme judicial court, bypassing the appeals court.[13] The applicable statute provides that the supreme judicial court and the appeals court have concurrent jurisdiction over most appeals.[14] Subject to the approval of two justices of the supreme judicial court, the court can order direct review of any case on appeal, as long as the issue to be decided is: (1) a question of first impression or a novel question of law; (2) a question of law concerning either the Constitution of the United States or that of the Commonwealth of Massachusetts; or (3) a question of such public interest that justice requires a final

10. Mass. App. Ct. R. 1:28 (West 2002).

11. *Id.* (indicating that the "panel need not provide an opportunity for oral argument before disposing of cases under this rule").

12. *Id.*

13. The only time saved by using this process is that saved by not going through the appeals court before review by the supreme judicial court. In a direct review case, the time for the filing of briefs is not any shorter than it is for the regular appellate process. In fact, when a case is transferred, the rule generally permits additional time for the filing of briefs. Mass. R. App. P. 11(g) (West 2002) (referring to Mass. R. App. P. 19 and giving parties "whichever [time] is later").

14. Mass. Gen. L. ch. 211A, § 10 (West 1989 & Supp. 2002); *see also Ashford v. Mass. Bay. Transp. Auth.*, 659 N.E.2d 273, 276 (Mass. 1995). The supreme judicial court, however, has exclusive jurisdiction over appeals in capital cases. Mass. Gen. L. ch. 278, § 33E (West 1998 & Supp. 2002).

determination by the supreme judicial court.[15] Under the statute, a party may request direct appellate review, but the supreme judicial court is also authorized to order direct review *sua sponte*.[16] Direct appellate review also occurs whenever a majority of justices on the appeals court certify upon considering a case that direct appellate review by the supreme judicial court is in the public interest.[17]

Appellate Rule 11 describes the process for parties who request direct appellate review.[18] Under this rule, when concurrent jurisdiction exists, an appeal must first be filed in the appeals court by the party wishing to apply for direct review.[19] The party then has twenty days after the appeal is docketed in which to make a written application to the supreme judicial court for direct appellate review.[20] The rule also details the contents of the application for direct review, which include the request itself, statements of prior proceedings in the case, the facts relevant to the appeal, a statement of the legal issues raised and a short argument regarding those issues, and a statement indicating why direct review is appropriate in the case.[21] Any party opposing direct review has ten days after the application is filed in which to file an opposition to it.[22] Whether the application is opposed or not, there is no right to oral argument on it, although the full supreme judicial court has discretion to hear argument in these cases.[23]

There is one quirk to remember about the direct-review process. It is the only review permitted in a capital case. The appeals court has no jurisdiction over such cases.[24] In exercising this plenary power, the supreme judicial court also performs a gatekeeper function in that once the case has been reviewed by

15. Mass. Gen. L. ch. 211, § 10(A) (West 1989 & Supp. 2002).

16. *Id.*

17. *Id.* at § 10(B).

18. *See* Mass. R. App. P. 11 (West 2002).

19. Mass. R. App. P. 11(a).

20. *Id.*; *see also supra* n. 13 and accompanying text.

21. Mass. R. App. P. 11(b)(1)–(6).

22. *Id.* at 11(c). The parties may also file a joint application for direct review. *Id.* at 11(a).

23. *Id.*

24. Mass. Gen. L. ch. 278, § 33E.

the court, all post-conviction motions must be presented to one of its justices instead of to the trial court.[25]

IV. THE SINGLE-JUSTICE PROCESS

In Massachusetts, the supreme judicial court has the general superintendent power "to correct and prevent errors and abuses" in "all courts of inferior jurisdiction."[26] The court primarily implements this power through a single-justice proceeding. The single-justice session is considered part of the business of a county court, and not part of the business of an appellate court, and the single justice who sits in this role is usually acting as a trial-court judge.[27] Although petitions are frequently made to a single justice, they are rarely successful, particularly when they relate to issues left to the discretion of the trial judge.[28] In order to be successful before the single justice, the

> defendant must show (1) that he has a substantial claim that an important substantive right, belonging to him, is being violated . . . , and (2) that the error is irreversible, such that an order for a new trial in the normal process of appeal would not place him in statu quo.[29]

For example, an appeal would likely be allowed in a case where there is a claim of double jeopardy.[30] Following a decision of the single justice in these cases, the full supreme judicial court may review the case, but it will affirm unless there is a clear error of law or an abuse of discretion.[31]

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25. *Id.* In this circumstance, there is no appeal from the decision of the single justice. *Id.*

26. Nolan, *supra* n. 1, at 58 (citing Mass. Gen. L. ch. 211, § 3).

27. *Id.* (indicating that the justice in a single-justice proceeding sits as a judge of the superior court).

28. *Id.*

29. *Costarelli v. Commonwealth.*, 373 N.E.2d 1183, 1186 (Mass. 1978) (citations omitted); *see also Morrissette v. Commonwealth.*, 402 N.E.2d 492, 493 (Mass. 1980) (citing *Costarelli*); *Hahn v. Planning Bd. of Stoughton*, 529 N.E.2d 1334, 1336 (Mass. 1988).

30. Nolan, *supra* n. 1, at 59; *see e.g. Costarelli*, 373 N.E.2d at 1186.

31. *Schipani v. Commonwealth.*, 409 N.E.2d 1300, 1301-1302 (Mass. 1980) (declaring in addition that the "extraordinary superintendency powers" may not properly be used "to preempt the process of trial and appeal"); *Hahn*, 529 N.E.2d at 1336 (noting that the

Although the requirement that the full court affirm any single justice's decision means that this procedure is generally not considered an expedited process,[32] it can have that effect in some cases.[33] Moreover, a single justice routinely hears certain categories of appeals and then determines whether to refer those cases to the full court. For example, a single justice hears appeals when a state licensing board suspends or revokes a professional license[34] and appeals from the Appellate Tax Board.[35] Additionally, appeals from decisions regarding bail are heard in the single-justice proceeding.[36] And once a trial judge has issued a pre-trial ruling on a motion to suppress evidence, either the Commonwealth or the defendant may request permission from a single justice of the supreme judicial court to appeal that order. The single justice has discretion to hear the appeal, to report it to the full court, or to refer it to the appeals court.[37]

A recent example where the single-justice process was used to expedite an appeal is *Bates v. Director, Office of Campaign & Political Finance*[38] This important and controversial case, in which a gubernatorial candidate was found entitled to a judgment of over $800,000 under the Clean Elections Act,[39] was

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"extraordinary remedy" provided by Mass. Gen. L. ch. 211, § 3 "should be invoked only when appellate review is otherwise unavailable").

32. Unlike in an appellate proceeding, the single justice has the authority to consider new facts and to hear evidence, which can slow the process down even further. Nolan, *supra* n. 1, at 66.

33. *See e.g. Bates v. Dir., Off. Campaign & Pol. Fin.*, 763 N.E.2d 6 (Mass. 2002), discussed *infra* at text accompanying nn. 38-42.

34. Mass. Gen. L. ch. 112, § 64 (West 1996 & Supp. 2002); *see also Kerrigan v. Bd. of Registration*, 506 N.E.2d 866, 867-868 (Mass. 1987) (indicating that appeal of suspension order is to single justice who must make findings of fact in support of order to stay execution of board's order); *Gurray v. Bd. of Pub. Accountancy*, 474 N.E.2d 1085, 1086 (Mass. 1985) (regarding discipline of a CPA). Appeals regarding the discipline of attorneys are also generally heard by a single justice. Mass. Sup. Ct. R. 4:01 § 1(2) (West 2002); Mass. Sup. Ct. R. 4:08 § 2 (West 2002); *see also Callahan v. Bd. of Bar Overseers*, 631 N.E.2d 43 (Mass. 1994).

35. Mass. App. Ct. R. 2:20 (West 2002).

36. Nolan, *supra* n. 1, at 63.

37. Mass. R. Crim. P. 15(a)(2) (West 2002); *see also Commonwealth. v. Dunigan*, 422 N.E.2d 1358 (Mass. 1981) (refusing to allow appeal of an order entered by a single justice, but acknowledging the aggrieved party's right to petition the supreme judicial court under Mass. Gen. L. ch. 211, § 3 for review of that order).

38. 763 N.E.2d 6 (Mass. 2002).

39. *Id.* at 30-31.

filed in the supreme judicial court through the single-justice session in October 2001. The single justice initially denied a preliminary injunction requested by the plaintiffs, and then reserved and reported the case to the entire court on an expedited schedule. Although the court did not report the actual expedited schedule, its decision was released on February 25, 2002.[40] That four-month period was rather shorter than the time the parties in an ordinary case might expect it to spend on appeal.[41]

In *Bates*, the supreme judicial court declared that the Massachusetts legislature had to either fund the Clean Elections Law or demonstrate that it had the power to repeal that law.[42] Given the importance of this issue, and the pressing time dimensions of the 2002 elections, it is easy to understand why this case was on an expedited schedule. However, since there are no formal rules for an expedited process, there can be no guarantee that any other case will be expedited. Each will be governed by the directions issued by the single justice who first hears it in the single-justice session.

The appeals court also has a single-justice proceeding, and most single-justice cases are first heard by a single justice of that court.[43] Parties may petition a single justice of the appeals court for relief from the entry of an interlocutory order,[44] and, in cases where the appeals court and the supreme judicial court have concurrent jurisdiction, a petition for interlocutory review should first be filed in the appeals court.[45] That court has entered a standing order describing the procedure for filing a petition and describes its contents: a request for review, a summary of the legal issues raised by the request, a description of the specific relief requested, and a copy of the trial court's order.[46] Additionally, the petition should include a memorandum of law,

40. *Id.* at 6.

41. *See e.g.* Mass. R. App. P. 19 (West 2002) (allowing almost three months just for assembly of the record and filing of the briefs in a case that has not been expedited).

42. *See* 763 N.E.2d at 73-74.

43. Nolan, *supra* n. 1, at 67.

44. Mass. Gen. L. ch. 231, § 118 (West 2000 & Supp. 2002).

45. *Ashford*, 659 N.E.2d at 273.

46. *Standing Order of the Appeals Court Concerning Petitions to the Single Justice Pursuant to G.L. c.231, § 118 (First Paragraph)* (Mass. App. 2002).

limited to fifteen pages, in support of the request.[47] Opposing parties have seven days in which to file oppositions to the request, and then it is in the single justice's discretion whether to hold a hearing on the request.[48] Should the justice decide to hold a hearing, that will of course increase the time involved in the proceeding.

Other examples of appeals being heard first in a single-justice sitting include appeals from the Industrial Accident Board[49] and appeals from orders regarding motions for expenses incurred in countering frivolous or bad-faith claims or defenses,[50] including the appeal of an award of attorney fees based on the filing of a frivolous complaint.[51]

V. CONCLUSION

Although the Massachusetts rules provide no explicit means of expediting an appeal, Massachusetts practice includes some options for speeding the process along. The party seeking to expedite an appeal should first determine whether the case qualifies for direct review by the supreme judicial court, which will eliminate the intermediate step in the appeals process. Next, he would be prudent to investigate the rules relating to single-justice proceedings in order to determine whether an early filing with a single justice might be a means of expediting his appeal. In the alternative, the appellant interested in expediting his appeal might consider asking either the supreme judicial court or the court of appeals to suspend the rules under the authority of Appellate Rule 2, and then to decide the case on an expedited basis. Accelerated treatment is not guaranteed for any case, but electing to use one of these three procedures might help the parties in a particular case secure a faster decision on appeal.

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47. *Id.* at ¶ (b).

48. *Id.* at ¶¶ (c), (e).

49. Mass. App. Ct. R. 2:04 (West 2002) (describing procedure for review of workers' compensation claims).

50. Mass. Gen. L. ch. 231, § 6G.

51. *See e.g. Bailey v. Shriberg*, 576 N.E.2d 1377, 1381-1382 (Mass. App. 1991); *Salvatore v. City of Northampton*, 391 N.E.2d 278 (Mass. App. 1979).