

INTRODUCTION

Welcome to the fourth edition of the *Appellate Procedure* volume of the Massachusetts Practice Series, now titled “*Appellate Practice and Procedure*.” This edition is an extensive revision and reorganization of the prior edition, published in 2009. My goal in preparing this edition was to create a legal reference resource that would be helpful to all categories of persons who interact with the appellate process. These persons include trial attorneys who find themselves with an issue that must be reviewed by an appellate court; self-represented persons engaged in their first encounter with the Massachusetts court system; the Justices and personnel of the Massachusetts Trial Court whose business is essential to the appellate courts while the procedure and practice of appellate courts is akin to a foreign language; attorneys who specialize full-time in appellate practices; as well as the personnel of the Massachusetts Appeals Court and Supreme Judicial Court—the clerks, law clerks, staff attorneys, and Justices; and finally the law students arriving wide-eyed in the Great Hall of the John Adams Courthouse on their first day to intern for a Justice.

The title of this edition has been revised from “*Appellate Procedure*” to “*Appellate Procedure and Practice*.” This change acknowledges that the volume’s scope has expanded beyond the mechanics of appellate procedure to now provide additional information about practicing before the appellate courts and the common case types and topics addressed on appeal.

The last edition was published in 2009, and subsequently much has changed in appellate practice and procedure. Indeed, from 2015 through 2018 I had the honor to serve as chair of the subcommittee of the Supreme Judicial Court Standing Advisory Committee on the Rules of Civil and Appellate Procedure that reviewed and proposed significant amendments and modernization of the Massachusetts Rules of Appellate Procedure. The rules were enacted in 1974 and, although many isolated amendments were adopted over the ensuing years, no full-scale review of them had occurred in over four decades. The subcommittee and the entire SAC rules committee ultimately recommended amendments to 31 of the 32 rules of appellate procedure—all except Rule 32, the “Title.” The Supreme Judicial Court approved these amendments effective on March 1, 2019, thus changing appellate procedure and justifying the need for a new edition of this volume.

In addition, in 2020 the Appeals Court also synthesized and modernized its rules and standing orders, which ranged from a rule adopted in 1972 to a standing order concerning electronic filing adopted in 2018. The new Massachusetts Appeals Court Rules became effective on July 1, 2020. Beyond simply rules, however, the practice of appellate advocates has changed much since the last edition. The Supreme Judicial Court and Appeals Court have generated countless decisions and orders impacting the law and procedure, as well as adopting new processes. In 2016 the appellate courts launched electronic filing programs. Electronic processes and documents have transformed how both advocates write and file, and how the Justices review, briefs and record appendices.

The prior edition totaled 9 chapters. This fourth edition has 83 chapters and is organized into 10 parts. Part I provides an overview of appeals and appellate procedure generally. Part II provides an overview of the Massachusetts Supreme Judicial Court and the Appeals Court, including a summary of each court's jurisdiction, role, caseload, and internal processes, as well as some relevant principles of law. Part III discusses finality, the principle that an order or judgment must be final before it may be appealed, and appealability, which includes when an order may be appealed before entry of a final judgment.

Part IV details the primary exceptions to the principle of finality—petitions for review under G.L. c. 231, § 118, first par.; the mysterious doctrine of present execution; a report of a question of law from the trial court or an appellate single justice to the appellate court; and a trial court's judge's entry of separate and final judgment in a civil case. Part V is related, and discusses the various types of motions and the law governing post-judgment challenges to a judgment entered in a civil or criminal case. Part VI discusses the mechanics of an appeal—from the many factors involved in considering whether to appeal, to the commencement of an appeal, motion practice in the appellate courts, the importance of preservation of error and the applicable standards of review before the appellate court, to appellate brief writing and oral argument. Many authors have written articles and treatises devoted exclusively to how to write a better appellate brief or to present an exceptional appellate oral argument. I have not attempted to improve upon or add to their works. Instead, my chapters focus more on the procedure and law governing briefing and oral arguments and how the courts have applied them.

Part VII discusses the Massachusetts appellate courts' decision-making processes and post-decision practices. These chapters discuss the courts' internal processes and timelines,

INTRODUCTION

post-decision procedures and motions, applications for further appellate review of an Appeals Court decision in the Supreme Judicial Court, the appellate court's issuance of its rescript to the lower court, the award of attorney's fees and costs on appeal, and a short overview of petitions for writ of certiorari to the Supreme Court of the United States.

Part VIII focuses on the single justice session of the Supreme Judicial Court. The chapter discusses the Court's and single justice's jurisdiction; petitions under G.L. c. 211, § 3; the single justice's authority to transfer or to reserve and report cases; applications for leave to appeal an interlocutory order determining a motion to suppress; and the various requests for relief and appeals that the single justice may consider such as bail determinations, attorney discipline appeals, extraordinary writs and civil actions in their nature.

Part IX is devoted to the single justice session of the Appeals Court. Topics include: petitions for interlocutory relief under G.L. c. 231, § 118, first par.; motions for a stay of execution of a judgment or sentence pending appeal; motions for extension of time; the single justice's authority to report or grant leave to take an interlocutory appeal; and statutory appeals and other common matters before the Appeals Court single justice. The appeals include review of indigency determinations and orders on a motion to waive, reduce, or for state payment of court fees or costs; procedural amount dismissals; appeals under the "Children Requiring Assistance" law; orders concerning attorney's fees under G.L. c. 231, § 6G; *lis pendens* appeals; and, impoundment orders. In addition, a chapter describing appellate review of summary process proceedings and related appeal bonds is included. Part IX concludes with a chapter discussing review by a single justice of the Supreme Judicial Court under G.L. c. 211, § 3, of an Appeals Court single justice's order.

The final part, Part X, consisting of 45 chapters, is entitled, "Particular appeals in the lower courts, common appellate case types and issues, and appellate procedure in the Federal courts." Appellate advocates, Justices, and staff encounter a myriad of issues and questions of law, both criminal and civil in nature. Some appellate issues and argument are well-developed after a trial and others are based on a scarce record; some appeals are presented by seasoned attorneys and others by a self-represented party on their first foray into the court system. Often appellate advocates and Justices need to examine topics they have never before encountered. This complexity is made more difficult by the volume of appeals, particularly in the Appeals Court due to the steady volume of appeals from a variety of courts and agencies

and the Appeals Court's responsibility to review all appeals that the Supreme Judicial Court does not transfer for direct appellate review. Indeed, administering the flow of cases at the Appeals Court has been analogized to "feeding the beast" and "sipping from a fire hose." The topics included in this part demonstrate how appropriate are those descriptions. Hopefully, this volume will assist some in the resolution of any related procedural questions.

As demonstrated by the title, Part X includes a diverse array of topics and subject matter which require a level of expertise beyond both my knowledge and my time available to prepare for this edition. Fortunately, several appellate clerks and attorneys possessing specialized knowledge and experience agreed to assist me by preparing or editing chapters. These chapters include: Child welfare appeals; Appellate Divisions of the District Court and Boston Municipal Court; the jurisdiction and procedure of the United States Court of Appeals for the First Circuit; appeals from Sex Offender Registry Board classifications; Contributory Retirement Boards, administrative agencies, and municipal boards.

Additional chapters are devoted to procedure and issues arising in appeals of domestic relations cases, from the Appellate Tax Board, the Commonwealth Employment Relations Board, the Contributory Retirement Appeal Boards, and small claims actions of orders involving attorney discipline, bail determinations, civil commitment, contempt, discovery, disqualification, and abuse or harassment prevention proceedings. Narrow issues, principles, and processes are also discussed including: the effect of a party's bankruptcy on a pending appeal; Electronic filing in the Massachusetts appellate courts; Issues concerning self-represented parties; Retroactive and prospective application of law; the doctrines of *res judicata* and collateral estoppel; Statutory construction; and the so-called disentitlement and "fugitive from justice" doctrines.

Finally, the edition includes voluminous appendices which will be helpful for research and reference purposes. The appendices include Appendix A, statements of law of the Massachusetts appellate standards of review; Appendix B, a compendium of civil appellate decisions (a/k/a the "Weaverology"); Appendix C, selected statutes and court rules concerning appellate procedure and practice; and Appendix D, the Massachusetts Rules of Appellate Procedure.

"Oyez, oyez, oyez, court is now in session"