CHAPTER 27

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Motion for a Continuance

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A motion for a continuance is governed by Mass. R. Crim. P. 10. Some typical grounds for a continuance motion include the unavailability of a witness; counsel's required presence in another court; illness of the defendant; prejudicial pretrial publicity; and an adequate opportunity to prepare the case, necessitated by such events as an amendment of the complaint, change of counsel, continuing investigation, or the opposing party's failure to comply with a discovery order.

§ 27.1 SCOPE AND LIMITS OF THE COURT'S DISCRETION

§ 27.1A. RELEVANT FACTORS GENERALLY

Whether to grant a continuance generally "lies within the discretion of the trial judge, whose action will not be disturbed unless there is a clear abuse of discretion."[1] Case law requires the court to balance the need for additional time against the inconvenience, increased costs, and prejudice to the opposing party,[2] and the judicial system's interest in avoiding fruitless delays.[3]

Rule 10 reflects these standards by mandating that once a case is entered on the trial calendar, a continuance may be granted only by the court on cause[4] and only when necessary to insure the interests of justice.[5] Rule 10(a)(2) further specifies a nonexhaustive list of factors the court should consider in assessing the need for a continuance: (A) whether denial of a continuance would make continuation of the proceeding impossible or result in a miscarriage of justice; (B) whether the case is so unusual or complex that counsel would reasonably require further time to adequately prepare; and (C) whether defense counsel's caseload routinely creates scheduling conflicts,[6] and whether a party has failed to diligently prepare for trial or obtain available witnesses.[7] On rare occasions, a serious illness may require a lengthy or

[1] Commonwealth v. Super, 431 Mass. 492 (2000); Commonwealth v. Painten, 429 Mass. 536, 543 (1999); Commonwealth v. Miles, 420 Mass. 67, 85 (1995); Commonwealth v. Watkins, 375 Mass. 472, 490 (1978); Commonwealth v. Cavanaugh, 371 Mass. 46, 50–51 (1976). *Accord* Commonwealth v. Bryer, 398 Mass. 9, 15 (1986); Commonwealth v. Haas, 398 Mass. 806 (1986); Commonwealth v. Gilchrest, 364 Mass. 272, 274 (1973); Commonwealth v. Bettencourt, 361 Mass. 515, 517–18 (1972).

[2] Commonwealth v. Cavanaugh, 371 Mass. 46, 51 (1976).

[3] Commonwealth v. Steven, 29 Mass. App. Ct. 978, 980 (1990) (rescript); Commonwealth v. Avery, 14 Mass. App. Ct. 137, *rev. denied,* 387 Mass. 1102 (1982); Commonwealth v. Gilchrest, 364 Mass. 272, 276–77 (1973).

[4] Mass. R. Crim. P. 10(a)(1). The Reporter's Notes elaborate that good cause is not established by the mere fact that the parties agree to the continuance request or that a continuance would be helpful but falls short of being necessary.

Only the judge, not a clerk-magistrate, may grant a continuance. Commonwealth v. Pacifico, 27 Mass. App. Ct. 254, 255 n.1 (1989).

[5] Mass. R. Crim. P. 10(a)(1).

[6] *See also* Commonwealth v. Dabrieo, 370 Mass. 728, 736-37 (1976); Commonwealth v. Festo, 251 Mass. 275, 277 (1925).

indefinite continuance.[8] The District Court Standards advise consideration of additional factors which are detailed in the margin.[9]

§ 27.1B. LIMITS ON THE COURT'S DISCRETION

The court's discretion may be circumscribed in particular cases by the following limitations:

1. The Thirty-Day Rule

The defendant may require that a district court continuance not exceed thirty days.[10] However, the statute does not foreclose repeated continuances of thirty days

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[7] Lack of diligence will often doom a continuance request. *See* Commonwealth v. Burston, 77 Mass. App. Ct. 411 (2010); Commonwealth v. Chase, 14 Mass. App. Ct. 1032 (1982); Commonwealth v. O'Brien, 380 Mass. 719, 722 (1980); Commonwealth v. Funderberg, 374 Mass. 577 (1978); Commonwealth v. Peters, 372 Mass. 319 (1977); Commonwealth v. Bettencourt, 361 Mass. 515, 518 (1972).

[8] *See, e.g.,* United States v. Zannino, 895 F.2d 1 (1st Cir. 1990) (where danger of trial due to medical condition alleged, trial court must weigh not only medical condition but defendant's attempts to remedy it, his conduct in court, possible measures to reduce risk, seriousness of offense and public interest in trial).

[9] Standards of Judicial Practice: Caseflow Management, Standard 3:02 (District Court Administrative Office, June 1980), details the following considerations:

> (B) Cases should be continued only when extraordinary circumstances, not within the control of the parties and not foreseeable at the time of setting the date of proceedings, necessitate a continuance. In ruling on motions for continuances, inquiry should be made into and decisions thereon should be governed by the following factors: (1) The time when the need for the continuance arose, and the diligence of counsel in bringing the need for a continuance to the attention of the court and opposing counsel at the earliest possible date and in attempting to avoid a continuance; (2) The proximity of trial, the age of the case, the established time limits for processing cases, and the nature of any previous continuances or prior orders entered in the case; (3) The earliest possible date all parties and the court will be ready to proceed; (4) Whether the continuance may be avoided by substitution of attorneys or witnesses, by the use of depositions or stipulations as to testimony, or by preservation of the testimony of witnesses who are available; and (5) the injury or inconvenience caused to the party not requesting the continuance.
>
> (C) No continuance should be granted solely because all parties agree thereto.
>
> (D) Failure of a client to adhere to financial arrangements with his attorney should not be grounds for a continuance.
>
> (E) The allowance or denial of a motion for a continuance is in the discretion of the court, but continuances should be sparingly granted and only in those instances when the obstacles to proceeding in the case cannot be provided for by any means other than granting a continuance . . .

Of course, if the only reason for granting a continuance is to "impede the Commonwealth's prosecution of the case," this would be an error of law. Commonwealth v. Taylor, 428 Mass. 623 (1999).

[10] On July 31, 1996, G.L. c. 276, § 35 was amended to require that an incarcerated defendant's case be continued no longer than 30 days, rather than the 10-day limitation that had previously applied. The "15-day rule" of G.L. c. 119, § 68 has, however, been retained in the

each. A 1992 amendment restricted the rule to defendants held in custody.[11] Failure to comply with the thirty-day rule may warrant dismissal in some circumstances.[12]

2. Speedy Trial

Mass R. Crim. P. 36 guarantees a trial within one year of district court arraignment or superior court indictment, subject to many exceptions for "excluded periods."[13] This rule and the constitutional guarantee of a speedy trial[14] provide an outer limit to the Commonwealth's ability to continue a case. Additionally, the District Court Standards advise even more stringent speedy-trial goals.[15]

3. Particular Hearings Requiring Expeditiousness

Other statutes limit the court's discretion to freely continue a probable-cause hearing,[16] a bail appeal,[17] an arraignment,[18] a juvenile proceeding,[19] a trial where the defendant is preventively detained[20] or otherwise in custody,[21] a sentencing,[22] a case for interlocutory appeal,[23] or a sua sponte revision and revocation of sentence.[24]

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latest changes to juvenile delinquency proceedings. *See infra* ch. 49.4 (discussion of St. 1996, c. 200, § 11).

[11] Previously, it had been held that the ten-day rule applied to all defendants, whether in custody or not. Alaya v. Commonwealth, No. 85-298 (September 20, 1985) (Wilkins, J.). The restrictive amendment became effective on April 24, 1992.

[12] *See supra* § 23.2G.

[13] *See* full discussion *supra* at ch. 23.

[14] U.S. Const. amend. 6; Mass. Const. Declaration of Rights art. 11.

[15] Standards of Judicial Practice: Caseflow Management, Standard 5:00 (District Court Administrative Office, June 1980), provides that the total time for processing a jury-waived case should be no greater than 60 days from the arrest, citation, or show-cause hearing to the adjudication; and for a jury case not greater than 90 days from receipt of the case in the jury court.

[16] In addition to the 30-day rule discussed above, G.L. c. 276, § 38, requires a probable-cause hearing to be held "as soon as may be." Additionally, a probable- cause determination is required before extended pretrial detention may ensue under Gerstein v. Pugh, 420 U.S. 103, 124 n.25 (1975), and Riverside County v. McLaughlin, 500 U.S. 44 (1991), and Massachusetts complaint procedure may not satisfy this requirement. *See* full discussion *supra* at § 2.1B(3), (4).

[17] An appeal of bail set by the district court must be heard in the superior court on the same day or if this is impossible, on the next business day. G.L. c. 276, § 58.

[18] A defendant under arrest must be immediately arraigned in the district court if then in session, or otherwise brought to the next session. G.L. c. 276, § 58; Mass. R. Crim. P. 7(a)(1). *See* further discussion *supra* § at 7.1, notes 3, 4. Also, under Commonwealth v. Rosario, 422 Mass. 48 (1996), an otherwise admissible statement taken from an arrested defendant before arraignment will not be excluded on grounds of unreasonable delay if the statement was made within six hours of arrest or the defendant waived the right to be arraigned without unreasonable delay. *See* further discussion *supra* at §§ 7:1 and 19.4G(3).

[19] Cases arising under G.L. c. 119 (the juvenile code) have precedence. G.L. c. 212, § 24.

[20] If the defendant is arrested for a subsequent offense while free on bail, the bail may be revoked and the defendant preventively detained. *See* discussion *supra* § 9.5B.

4. Noncompliance with Pretrial Conference Requirements Bars Continuance

"If a conference report is not filed and a party does not appear at the scheduled time, no request of that party for a continuance of the trial date as scheduled shall be granted and no pretrial motion of that party shall be permitted to be filed, except by leave of court for cause shown. If both parties fail to file the report or or do not appear at the pretrial hearing…the case shall be scheduled for trial at the earliest possible time." The just m ay impose appropriate other sanctions as well.[25]

5. Right to Adequately Prepared Counsel

Counsel is entitled to a "reasonable opportunity to prepare," which is grounds for a continuance by right.[26] Denying adequate time may abridge the constitutional

[21] Detained defendants are to be given preference for trial over other criminal defendants (Mass. R. Crim. P. 36(a)(1)), and over civil trials if not a life or death felony. G.L. c. 212, § 29. *See also* Commonwealth v. McCants, 20 Mass. App. Ct. 294, 301 n.8 (1985) (court should be "comparatively grudging" in continuing a case where defendant is incarcerated).

[22] The Commonwealth must move for sentencing not later than seven days after a verdict or guilty plea (G.L. c. 279, § 3A), and the defendant is entitled to be sentenced "without unreasonable delay." Mass. R. Crim. P. 28(b).

[23] In Commonwealth v. Cavanaugh, 366 Mass. 277, 279 (1974), the court stated that "interlocutory appeals . . . should not be permitted to become additional causes of the delays in criminal trials," and in Commonwealth v. Smith, 384 Mass. 519, 524 (1981), added that courts should "avoid piecemeal appellate consideration." *But see* Commonwealth v. Lewin (No. 3), 408 Mass. 147 (1990). Interlocutory appeals are discussed *infra* at § 45.6.

[24] Under Mass. R. Crim. P. 29, a court is without power to revoke and revise a sentence sua sponte unless it does so within 60 days of the imposition of sentence or certain actions of the appellate court. Aldoupolis v. Commonwealth, 388 Mass. 260, 269 (1982), *cert. denied*, 459 U.S. 864 (1982). If the defendant files a motion within the 60 days, however, there is no specified period within which the court must act. *See* full discussion *infra* § 44.3A.

[25] Mass. R. Crim. P. 11(a)(2)(B).

[26] Commonwealth v. Carsetti, 53 Mass. App. Ct. 558 (2002)(defendant may not be forced to go to trial with counsel who is incompetent or unprepared); Commonwealth v. Small, 10 Mass. App. Ct. 606 (1980); United States v. Waldman, 579 F.2d 649 (1st Cir. 1978); Lindsey v. Commonwealth, 331 Mass. 1 (1954); Melanson v. O'Brien, 191 F.2d 963, 968 (1st Cir. 1951). *See also* Mass. R. Crim. P. 10(a)(2)(B) (court should consider whether case so complex that it is unreasonable to expect preparation in allotted time). *But see* Commonwealth v. Johnson, 424 Mass. 338 (1997) (conviction affirmed where defendant who had elected to proceed pro se with standby counsel was persuaded by the court to be represented by standby counsel, but standby counsel told the court he was not prepared to try the case, a continuance was denied, and the judge determined the case would proceed with counsel acting in the standby role only); Commonwealth v. Richardson, 37 Mass. App. Ct. 482, 487–88 (1994) (defendant arrested five months after he failed to appear for trial, and case was set for trial on the following Monday; counsel's motion for continuance held permissibly denied, as case had been set for trial almost five months earlier and would have been tried then but for defendant's default); Commonwealth v. Haley, 413 Mass. 770, 775 (1992) (no abuse of discretion in denying defense counsel's motion for a two-day continuance for unpreparedness presented on morning of commencement of trial when used as a delaying tactic).

Additionally a defendant is specifically guaranteed time to prepare for a bail hearing by Dist. Ct. Supp. R. Crim. P. 1.

right to counsel.[27] "A myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."[28] Cases support a continuance in particular cases where the prosecutor has failed to provide timely discovery[29] or has presented a surprise witness,[30] where counsel has just been appointed,[31] or where counsel is otherwise unprepared.[32]

[27] Commonwealth v. Cavanaugh, 371 Mass. 46, 51 (1976) (mere presence of unprepared attorney not sufficient to satisfy right to counsel or due process); Rastrom v. Robbins, 440 F.2d 1251 (1st Cir.), *cert. denied*, 404 U.S. 863 (1971) (extended analysis); Chandler v. Fretag, 348 U.S. 3 (1954); Hawk v. Olson, 326 U.S. 271, 278 (1945); White v. Ragen, 324 U.S. 760, 764 (1945) (habeas corpus relief proper if insufficient time deprived defendant of right to effective assistance of counsel); Powell v. Alabama, 287 U.S. 45, 53, 71 (1932) (Sixth Amendment right to counsel includes provision of sufficient time for counsel to give "effective aid in the preparation and trial of the case").

In *Cavanaugh supra*, 371 Mass. at 51, the court stated: "There is no 'mechanical test' for deciding when a denial of a continuance is so arbitrary as to violate a defendant's right to effective assistance of counsel and to due process of law [citing Commonwealth v. Smith, 353 Mass. 442, 445 (1968)]. 'The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied" [citing Ungar v. Sarafite, 376 U.S. 575, 589 (1964)]."

Any claim should be based on both U.S. Const. amends. 6, 14, and Mass. Const. Declaration of Rights art. 12.

[28] Commonwealth v. Carsetti, 53 Mass. App. Ct. 558 (2002)(judge has discretion to grant defendant's request for new counsel on eve or day of trial); Commonwealth v. Smith, 353 Mass. 442, 445 (1968) (quoting Ungar v. Sarafite, 376 U.S. 575, 589 (1964)).

[29] *See* Commonwealth v. Gagliardi, 21 Mass. App. Ct. 439, 446–47 (1986) (new trial upheld based inter alia on denial of discovery regarding a witness until trial); Commonwealth v. McCann, 20 Mass. App. Ct. 59, 66 (1985); Commonwealth v. Baldwin, 385 Mass. 165, 177 (1982) ("defense counsel should, when faced with delayed disclosure situations, seek 'additional time for investigative purposes' "). *But see* Commonwealth v. Bryant, 390 Mass. 729 (1984) (in absence of prejudice, defense request for continuance, or deception, late discovery did not abridge fair trial); Commonwealth v. Small, 10 Mass. App. Ct. 606, 609 (1980) (prior misidentification revealed two days before trial, but sufficient time to adequately prepare defense); Commonwealth v. Grieco, 5 Mass. App. Ct. 350, 356–57 (1977) (continuance not required since judge permitted counsel to interview each witness before testimony).

[30] The court may exercise discretion to provide a midtrial continuance to permit investigation of surprise testimony. Commonwealth v. Baldwin, 385 Mass. 165 (1982); Commonwealth v. Dukes, 3 Mass. App. Ct. 771 (1975) (rescript).

[31] Commonwealth v. Brennick, 14 Mass. App. Ct. 952, 953 (1982) (rescript) (substitution of another public defender for defendant's public defender on day of sentencing violated right to counsel); United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975); Hawk v. Olson, 326 U.S. 271, 278 (1945) (denial of continuance effectively denied defendant consultation with counsel in violation of Fourteenth Amendment); Powell v. Alabama, 287 U.S. 45, 53 (1932) ("designation of counsel . . . was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid"). *See also* Matter of Scott, 377 Mass. 364, 375–76 (1979), in which Judge Scott was censured on the basis of many abuses, one of which (no. 13) was the denial of a continuance where counsel had not yet met with the client and had notified the prosecuting officer in advance of the need for a continuance. *But see* Commonwealth v. Brant, 346 Mass. 202, 203 (1963) (court upholds denial of continuance for new counsel when previous attorney withdrew on the day of trial).

The Fourth Circuit instituted a rebuttable presumption of ineffective assistance when an appointment occurs so close to trial that inadequate preparation time exists (Garland v. Cox,

Additionally, courts have an affirmative duty to take those steps that are necessary to ensure competent representation to a defendant.[33]

Moreover, defense counsel has a professional obligation to seek a continuance where necessary to adequately defend a client.[34] In at least one case, a lawyer's failure

472 F.2d 875, 879 (4th Cir. 1973)), although the First Circuit has declined to follow this rule. Rastrom v. Robins, 440 F.2d 1251, 1252 (1st Cir.), *cert. denied,* 404 U.S. 863 (1971).

If the court had determined that no counsel would be appointed (which it may do in the case of a misdemeanor where the court announces no incarceration will occur) and later revokes that determination and appoints counsel, the defendant "shall be entitled to a continuance to conduct any necessary discovery and to prepare adequately for trial." G.L. c. 211D, § 2A, as amended by Acts of 1991, c. 138, § 205.

[32] *See, e.g.,* Commonwealth v. Caban, 48 Mass. App. Ct. 179, 182–3 (1999) (suggesting that defense counsel should have requested a continuance to interview and prepare a defense witness whom he had decided to call mid-trial to support alibi defense); Commonwealth v. Nester, 32 Mass. App. Ct. 983, 986 (1992) (defense entitled to requested one-day continuance where both prosecution and defense attorney surprised by expert's testimony at trial); Commonwealth v. Benoit, 389 Mass. 411, 426–28 (1983) (defense counsel has right to recess of trial in order to interview prospective witness who was held in custody of Commonwealth and located only through judicial process during trial); Commonwealth v. Cavanaugh, 371 Mass. 46 (1976) (counsel claims no time to interview witnesses or fully interview defendant where appointed one week before trial); Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976) (defendant may not be forced to proceed to trial with incompetent or unprepared counsel); Rastrom v. Robbins, 440 F.2d 1251 (1st Cir. 1971); Lindsey v. Commonwealth, 331 Mass. 1 (1954); Melanson v. O'Brien, 191 F.2d 963, 968 (1st Cir. 1951) (right to counsel includes reasonable opportunity to secure counsel or prepare and investigate). *See also* Commonwealth v. Jervis, 368 Mass. 638, 644–45 (1975) (failure to provide bill of particulars or amendment of complaint may provide basis for continuance). *But see* Commonwealth v. Bandy, 38 Mass. App. Ct. 329 (1995) (no abuse of discretion where defense request for one-hour continuance to obtain an expert witness on allegedly ambiguous document denied on the ground that counsel was aware on the preceding evening that the ambiguity was an issue); Commonwealth v. Shea, 38 Mass. App. Ct. 7, 9 (1995) (conviction affirmed where no prejudice shown from denial of continuance requested to obtain psychoneurological evaluation); Commonwealth v. Miles, 420 Mass. 67, 84–86 (1995) (motion for continuance to obtain transcript of defendant's first trial and pretrial hearings, to investigate testimony of Commonwealth's expert, and to retain defense expert held permissibly denied).

[33] ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-1.1 (3d ed. 2000); District Court Standards of Judicial Practice: Arraignment, Standard 5:04 (Aug. 1977); McMann v. Richardson, 397 U.S. 759, 771 (1970). *See also* Lakeside v. Oregon, 435 U.S. 333, 341–42 (1978) (judge, not counsel, has ultimate responsibility for assuring fair and lawful trial); Commonwealth v. Carsetti, 53 Mass. App. Ct. 558 (2002)(when defendant requests continuance in order to change counsel, judge must balance defendant's right to obtain counsel of his choice against public interest in expeditious trial).

[34] Mass. R. Prof. C.1.1 ("a lawyer shall provide competent representation to a client"); ABA STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION, Standard 4-4.1 (3d ed. 1993) (duty to investigate case); Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases (revised 2004),, Guidelines 1.3(j) (duty to seek necessary continuance, following court procedures which minimize inconvenience), 1.3(f) (client must decide whether to waive right to a speedy trial), 6.1 (list of necessary preparatory steps before trial), and 6.6(e) (seek continuance or sanctions where prosecution presents surprise evidence which should have been provided as pretrial discovery).

to seek a continuance when necessary was found to be "grossly incompetent" in violation of the Sixth Amendment.[35]

Another Sixth Amendment issue arises when the defendant seeks a continuance in order to obtain or change counsel. Several cases have held that the defendant's freedom to change counsel "is restricted on the commencement of trial,"[36] and the defendant must have diligently sought counsel during the time available.[37] However, the defendant must have been afforded a "reasonable opportunity" to obtain counsel,[38] and a last-minute continuance to change counsel may still be constitutionally required if events before or during trial reveal that counsel is lacking in skill, preparation, undivided loyalty, ability to communicate with the defendant, or other necessary components of the right to effective assistance.[39] Defense counsel, and not the

[35] United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975) (although counsel appointed on day of trial is not inevitably or presumptively unprepared, facts of the case establish a Sixth Amendment violation here).

[36] Commonwealth v. Chavis, 415 Mass. 703, 710–12 (1993); Commonwealth v. Dunne, 394 Mass. 10, 13–16 (1985) (day jury empanelment was to commence). *See also* United States v. Richardson, 894 F.2d 492 (1st Cir. 1990) (not error to deny shift from public to private counsel on morning of trial); Commonwealth v. Burbank, 27 Mass. App. Ct. 97, 106–08 (1989); United States v. Panzardi Alvarez, 816 F.2d 813 (1st Cir. 1987); Commonwealth v. Dutra, 15 Mass. App. 542, *rev. denied*, 389 Mass. 1103 (1983) (on day of trial, defendant not entitled to continuance to replace appointed counsel with private counsel yet to be retained); Commonwealth v. Diatchenko, 387 Mass. 718 (1982) (during jury empanelment); United States v. Poulack, 556 F.2d 83, 86 (1st Cir. 1977) (court must blend appreciation of difficulties of trial administration with concern for constitutional protections; defendant's right to choose own counsel cannot be insisted on in a manner which obstructs reasonable court procedure); Commonwealth v. Bettencourt, 361 Mass. 512 (1972) (no continuance for obtaining counsel required where defendant had one month until trial date and did nothing); Lamoureux v. Commonwealth, 353 Mass. 556, 560 (1968) (second day of trial).

Additionally, the following cases address the court's discretion to deny last minute shifts in representation which threaten to delay the proceedings: Commonwealth v. Haas, 398 Mass. 806, 814–15 (1986); Commonwealth v. Dunne, 394 Mass. 10, 14–15 (1985); Commonwealth v. Tuitt, 393 Mass. 801, 804 (1985); Commonwealth v. Moran, 388 Mass. 655, 659 (1983); Commonwealth v. Jackson, 376 Mass. 790, 795–97 (1978), *denial of habeas aff'd*, Jackson v. Amaral, 729 F.2d 41 (1st Cir. 1984); Commonwealth v. Flowers, 5 Mass. App. Ct. 557, 565–66 (1977); Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976); Commonwealth v. Miskel, 364 Mass. 783, 791 (1974); Commonwealth v. Scott, 360 Mass. 695, 699–701 (1971).

[37] "[L]ack of diligence on the part of the defendant in securing counsel or seeking the aid of the court may be sufficient to justify the denial of a continuance." Commonwealth v. O'Brien, 380 Mass. 719, 722 (1980); Commonwealth v. Bettencourt, 361 Mass. 515, 518 (1972). *See also* Commonwealth v. Higgins, 23 Mass. App. Ct. 552, 555 (1987) (failure to seasonably secure counsel may constitute waiver of right to counsel).

[38] Mass. R. Crim. P. 8; Commonwealth v. Perry, 6 Mass. App. Ct. 531, 539 (1978); Commonwealth v. Bettencourt, 361 Mass. 515, 517 (1972). The court is not obligated to grant indefinite postponements while the defendant continues to seek private counsel. Fillippini v. Ristaino, 585 F.2d 1163 (1st Cir. 1978).

[39] *See* discussion of factors and accompanying citations in Commonwealth v. Dunne, 394 Mass. 10, 15 (1985).

A hearing might be required on any claim by the defendant that his counsel is incompetent, unprepared, or harbors conflicting interests, at least when the court has no reason to suspect the bona fides of the defendant. Commonwealth v. Flowers, 5 Mass. App. Ct. 557, 565–66 (1977). *See also*, United States v. Prochilo, 187 F.3d 221 (1st Cir. 1999) (setting aside

defendant, has the obligation to come forward and inform the judge of the defendant's need for a continuance in order to obtain new counsel.[40]

Denial of continuance motion where counsel is unprepared: If the court denies the defense a continuance that counsel believes is essential to adequately defend the client, the ethical and practical considerations become complex. A motion to withdraw[41] or an appeal[42] should often be the next step, but if this too is denied, counsel must face the issue of whether to defend as best she can, or explicitly refuse to participate in a "sham defense."[43] The first course risks creating the appearance but not reality of a criminal defense, which may result in a weakened appellate position,[44] although the court has also at times recognized that such a Hobson's choice does not satisfy the Sixth Amendment right.[45] The second course abandons what chances for success at trial exist despite lack of preparation. Moreover, at some point a court may respond to the second course with an order to "participate" and ultimately a contempt citation;[46] if it comes to that, the pre-1998 disciplinary rules provided that an attorney

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conviction because judge's denial of defendant's motion for continuance to retain new counsel, due to alleged differences with appointed counsel, held to be an abuse of discretion, where no inquiry or findings were made). However, the Sixth Amendment right does not require that counsel and the defendant enjoy a "meaningful relationship." Morris v. Slappy, 461 U.S. 1, 11 (1983). *See* discussion *supra* at ch. 8.

Before trial begins a dilatory motive is "probably not now a sufficient basis on its own for denying" an otherwise proper motion to defend pro se. Commonwealth v. Chapman, 8 Mass. App. Ct. 260, 267 n.8 (1979).

[40] Commonwealth v. Carsetti, 53 Mass. App. Ct. 558 (2002).

[41] Counsel *must* withdraw from a pending proceeding if continuing in the case would violate a rule of professional conduct or other law, Mass. R. Prof. C. 1.16, and *may* withdraw if "other good cause for withdrawal exists." *Id.; see also* former DR 2-110(C)(2).

[42] Counsel might seek exercise of the S.J.C. general superintendence power through an application under G.L. c. 211, § 3 (*see infra* § 45.9).

[43] Denial of adequate time to confer with the accused and prepare for trial "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." Avery v. Alabama, 308 U.S. 444, 446 (1940).

[44] *See, e.g.*, Commonwealth v. O'Brien, 380 Mass. 719, 723 (1980); Commonwealth v. Alexander, 2 Mass. App. Ct. 911 (1975) (rescript); Frates v. Bohlinger, 472 F.2d 149, 151 (1973) (counsel put on "spirited defense" despite denial of requested continuance to prepare). In addition to reducing appellate prospects, handling a trial without adequate preparation might violate S.J.C. Rule 3:07, DR 6-101(A)(2), unless conflicting ethical obligations override it.

[45] *See* Commonwealth v. Cavanaugh, 371 Mass. 46, 53–54 (1976), in which counsel's continuance request was denied despite his claimed unpreparedness. The defendant then rejected representation and proceeded pro se. On appeal, the Commonwealth claimed a waiver of the right to counsel based on the defendant's active defense, but the court stated that "to argue that proceeding to trial with consulting counsel who felt he was not adequately prepared, amounted to a knowing and intelligent waiver is to suggest that a defendant may only reserve his rights on the issue by refusing to go to trial at all, or by remaining entirely silent throughout the trial." *Cavanaugh, supra*, 371 Mass. at 54.

[46] In past practice, when counsel and the judge have been at loggerheads and a contempt citation has been likely, the conflict has sometimes been resolved through the involvement of others, such as the presiding judge and (in the case of appointed counsel) the CPCS deputy chief counsel. All counsel in the case should be aware of such discussions.

may not disregard a court order but "may take appropriate steps in good faith to test [its] validity."[47] Counsel thus runs a risk of being disciplined if she refuses to comply with a court order.[48]

Because counsel is obligated to zealously defend the client's interests, the decision must also include an assessment of which course of action stands the most reasonable chance of success, at trial or on appeal. In either case, counsel must make clear and continuing statements on record cataloguing her diligence, the ways in which she nevertheless remains unprepared, and the prejudice suffered by the defendant.

6. Unavailable Witnesses/Defendant's Right to Present a Defense

When a continuance is necessary to obtain the attendance of witnesses or other evidence, its denial may abridge the defendant's constitutional rights to present a defense and due process.[49] The defendant's argument will be far stronger if the witness has been subpoenaed[50] and if an offer of proof is made that demonstrates the

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A defense to contempt based on willful disobedience of a court order might stress failure to prove the element of "ability to comply." Milano v. Hingham Sportwear Co., 366 Mass. 376, 378 (1974); McNeil v. Director, Patuxet Institution, 407 U.S. 245, 251 (1972). *See* full discussion of contempt *infra* ch. 46.

For a case in which unprepared counsel refused to participate in a trial which was ultimately reversed, *see* Little v. Superior Court, 110 Cal. App. 3d 667, 168 Cal. Rptr. 72 (Cal. Ct. App. 1980).

[47] S.J.C. Rule 3:07, DR 7-106(A). *See also* Mass. R. Prof. C. 1.2 (scope of representation); 1.3 (diligence and zealous advocacy); 3.1 (lawyer may make good faith argument for extension, modification or reversal of existing law.)

[48] In Florida Bar v. Rubin, Florida Supreme Court No. 72,255 (Aug. 31, 1989), the court publicly reprimanded a lawyer whose motion to withdraw (based on the client's intention to perjure himself) was denied. The majority found that under DR 7-106(A), an attorney may not disobey a court order based on his personal belief in its invalidity because that would lead to "pandemonium" in the court system. The court also cited the attorney for violating DR 1-102(A)(5) (conduct prejudicial to the administration of justice) and DR 2-110(A)(1) (lawyer may not withdraw without court permission).

A dissent argued that because the attorney would have violated a disciplinary rule either way, his violation was not willful and he should not be disciplined.

[49] *See* Commonwealth v. Silva, 6 Mass. App. Ct. 866 (1978) (denial of continuance to obtain testimony of two significant witnesses was abuse of discretion). While *Silva* did not rely explicitly on constitutional grounds, the right to present a defense is guaranteed by the compulsory process clause of the Sixth Amendment to the United States Constitution and the right to produce all proofs guaranteed by art. 12 of the Mass. Const. Declaration of Rights. *See also* United States v. Burns, 898 F.2d 819 (1st Cir. 1990) (after severing case so defendant could avail himself of codefendant's exculpatory testimony, court's refusal to grant continuance when codefendant became unavailable was prejudicial and warranted new trial).

The prosecution has an interest in presenting a case when all its witnesses are present, but this is not based on the Sixth Amendment. Commonwealth v. Correia, 531 F.2d 1095 (1st Cir. 1976) (judge properly denied continuance when government had four weeks to find its witnesses).

[50] *See* Commonwealth v. Puleio, 394 Mass. 101, 103–04 (1985) (no continuance to obtain certified copies of witness's criminal record since could have been obtained earlier by subpoena or otherwise); Commonwealth v. Scott, 19 Mass. App. Ct. 983, 985 (1985) (one factor was failure to seek process).

importance of the witness to the defense,[51] steps which are mandated by Super. Ct. R. 4 as detailed in the next section.

If a prospective witness first becomes available during trial, the defendant is entitled to a recess to interview the witness.[52] Conversely, where the prosecution received very short notice of a trial date, promptly attempted to contact its witnesses and it was "difficult, if not impossible for the witnesses to be available" it was held to be an abuse of discretion for the trial judge to deny the Commonwealth's motion for a continuance.[53]

7. Right to an Unprejudiced Jury

Where a spate of prejudicial pretrial publicity makes a fair trial impossible at the moment, a continuance is one among several remedies which may be chosen to meet the constitutional requirement.[54]

8. Cases Continued for Pretrial Probation.

The S.J.C. has differentiated the continuance of a case subject to conditions from an order of pretrial probation pursuant to G.L. c. 276, § 87. The latter requires that conditions be coupled with a "supervisory element to ensure that the probationer abides by the probationary terms."[55]

§ 27.2 OBTAINING OR CONTESTING A CONTINUANCE

§ 27.2A. PROCEDURAL REQUIREMENTS FOR OBTAINING A CONTINUANCE; ARGUMENT

[51] A continuance is not required when the unavailable evidence would be immaterial, marginal, cumulative, or corroborative. *See, e.g.*, Commonwealth v. Bryer, 398 Mass. 9, 15–16 (1986); Commonwealth v. Scott, 19 Mass. App. Ct. 983, 985 (1985) (defendant bore burden of justifying need for continuance, and failed to show how witness would corroborate defendant's story); Commonwealth v. Chase, 14 Mass. App. Ct. 1032, 1034 (1982) (rescript); Commonwealth v. Bennett, 8 Mass. App. Ct. 935 (1979); Commonwealth v. Funderberg, 374 Mass. 577 (1978). In these cases, continuances were denied because the witnesses were not shown to be relevant and necessary to the defense. *See also* Commonwealth v. Holmes, 34 Mass. App. Ct. 916, 919 (1993) (continuance properly denied where witness out of state for nine days would probably invoke privilege as she had done at pretrial hearing); Commonwealth v. Watkins, 375 Mass. 472 (1978); Commonwealth v. Silva, 6 Mass. App. Ct. 866 (1978) (rescript) (court should consider whether missing evidence is merely cumulative); Commonwealth v. Darden, 5 Mass. App. Ct. 522 (1977).

[52] Commonwealth v. Benoit, 389 Mass. 411, 426–28 (1983) (defense counsel had a right to recess of trial in order to interview prospective witness who was held in custody of Commonwealth and located only through judicial process during trial, but harmless error).

[53] Commonwealth v. Super, 431 Mass. 492, 496 (2000) (also holding, however, that a judge has the authority to empanel a jury even if the Commonwealth chooses not to move for trial and upholding the grant of defendant's motion for required finding of not guilty where the prosecutor declined to make opening statement and refused to call any witnesses or put on any evidence).

[54] *See* full discussion *supra* at § 26.3E.

[55] Commonwealth v. Taylor, 428 Mass. 623 (1999).

Counsel seeking a continuance should first contact the opposing counsel and lawyers for any codefendants to seek their agreement to a new date. If no agreement is forthcoming, counsel should notify them that a continuance will be sought in court.

In some courts, opposing counsel's agreement may be sufficient because the prosecutor controls the calendar and as a practical matter can remove court hearings unilaterally. However, ordinarily only the court can grant a continuance.[56]

In an attempt to create a more efficient procedure, while maintaining the ultimate authority of the court to rule on continuance motion, Mass. R. Crim. P. 10 was amended in 1997 to permit a judge to rule on a continuance motion without a hearing under certain circumstances. A motion for a continuance may now be filed with a request that the court rule on the motion without a hearing if (1) the motion is filed at least three court days prior to the scheduled appearance or trial date, and (2) the motion indicates that all parties have agreed to the continuance.[57] In such a case, the court, "shall, prior to the scheduled date, rule on the motion without a hearing unless it deems a hearing to be necessary."[58]

Mass. R. Crim. P. 10(a)(4) also permits the court to rule on a continuance motion "in any other case" without a hearing, "provided that all parties have had an adequate opportunity to file an opposition to the motion." Thus, if counsel desires to invoke this procedure, service to all parties must be documented as far as possible before the date on which the court is asked to rule. As neither the Rule nor the Reporters' Notes elaborates on the phrase *an adequate opportunity to file an opposition,* a judge will have substantial discretion in such cases to decide what was "adequate" under the circumstances. The time limitations for pretrial motions of Mass. R. Crim. P. 13(d)[59] provide guidance, however.

Whether or not the continuance motion is agreed on by other parties, the Rule requires any motion filed under Mass. R. Crim. P. 10(a)(4) to provide one or more proposed continuance dates and to state all supporting grounds. Factual allegations "shall be supported by affidavit."

In any case in which the court continues a case without a hearing, it is also now the responsibility of defendant's counsel to inform the defendant of the revised date. This provision, similar to Mass. R. Crim. P. 7(a)(2) (which permits a defendant who is summoned to court to be excused from appearing if counsel enters an appearance prior to the return day), raises obvious questions about what might happen should the defendant default at the revised date due to an alleged failure of notification.[60] Clearly, counsel must be absolutely certain to notify the defendant. The best practice would be to do so in writing.

In cases where the new procedures for motions without hearings are not feasible, such as where there is no agreement, insufficient time, or counsel feels that a hearing would be helpful, the better practice generally would be to submit a written motion and affidavit in advance, stating all grounds and offering possible dates. This motion could be marked for hearing pursuant to Mass. R. Crim. P. 13(d).[61] If a continuance motion is based on a court conflict, Mass. R. Crim. P. 10(a)(3) requires

[56] Mass. R. Crim. P. 10(a); Commonwealth v. Pacifico, 27 Mass. App. Ct. 254, 255 n.1 (1989).

[57] Mass. R. Crim. P. 10(a)(4).

[58] Mass. R. Crim. P. 10(a)(4).

[59] *See supra* ch. 15.

[60] *See* discussion of "solid defaults" *supra* in § 3.11F(2).

[61] *See supra* § 27.2A.

twenty-four hours notice to the court and all parties or "within such other time as is reasonable under the circumstances."

As Rule 10 does not expressly require a written motion in all circumstances, counsel may simply appear on the original date and seek a continuance then. However, this is an especially risky strategy since the advent of the new procedures described above. Also, where the need was apparent earlier the Criminal Rules,[62] Superior Court Rules,[63] and District Court Standards[64] generally require that a written motion be filed in advance. Factual allegations should be supported by affidavit.[65]

Certain grounds for a continuance motion invoke special requirements. Super. Ct. R. 4 states that the court need not consider a motion for a continuance that is grounded on the present *unavailability of a witness* or other evidence, unless supported by an affidavit that states: (1) the name and, if known, the residence of the witness; (2) the testimony expected and grounds for that expectation; and (3) the efforts made to secure attendance. The opposing party may not contest whether the witness would testify to the statements in the affidavit but may contest any other assertions. Rule 4 further provides that "the court will not ordinarily grant" the motion if the witness was not previously summoned and tendered witness fees, or if the opposing party stipulates that the expected testimony may be considered as evidence at the trial or hearing.

An attorney who requires a continuance because of a *conflicting engagement in another court* must notify the court and adverse party "not less than twenty four hours before the scheduled appearance, or within such other time as is reasonable under the circumstances."[66]

If there is any doubt that a continuance has been or will be granted, it is imperative for counsel to appear on the original court date, prepared for the hearing (for example, with witnesses available on call). Failure of the defendant to appear without advance court permission may result in default and forfeiture of bail.

Arguing for a continuance: The motion and argument should track the factors detailed in Rule 10 and case law as elaborated in *supra* in § 27.1, including where relevant:

1. The adequacy of advance notice given to opposing counsel.
2. Agreement if any from other parties.

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[62] Mass. R. Crim. P. 13(a) (pretrial motions must be in writing). In Commonwealth v. Dutra, 15 Mass. App. Ct. 542, 545 (1983), the court implicitly found Rule 13 applicable to a continuance motion by noting that its form was defective under that rule.

[63] Super. Ct. R. 9.

[64] The District Court Standards advise that as soon as the need for a continuance is apparent, counsel should submit a written motion detailing the grounds, when the need arose, the measures taken to avoid seeking a continuance, and the earliest date all parties could be ready. Standards of Judicial Practice: Caseflow Management, (June 1980), Standards 3:00; 3:01. However, the Commentary to Standard 3:00 also notes that where advance filing is impossible, an oral motion is permissible as long as written documentation is subsequently submitted.

[65] Mass. R. Crim. P. 13(a)(2) (pretrial motion to be supported by affidavit if facts alleged); Super. Ct. R. 9 (same); Super. Ct. R. 4 (affidavit required where alleging need for testimony presently unavailable). *See also* Commonwealth v. Scott, 19 Mass. App. Ct. 983, 985 (1985) (rescript) ("conspicuously absent" was affidavit regarding expected witness testimony); Commonwealth v. Dutra, 15 Mass. App. Ct. 542 (1983); Commonwealth v. Nunes, 351 Mass. 401, 404 (1966) (no proof to substantiate claim of illness).

[66] Mass. R. Crim. P. 10(a)(3).

3. Counsel's diligence (in preparing for trial, locating witnesses, serving subpoenas, moving for a continuance when the need first became apparent, etc.).
4. Unforeseeable, unusual, or complex factors in the case that make the time previously allotted insufficient.
5. The precise prejudice the defendant will suffer if the continuance is denied (why the witness is essential, areas which need to be investigated, etc.). To track Rule 10, counsel should show that this prejudice threatens a miscarriage of justice and that no other remedy is available; counsel also must assess a countervailing consideration: the discovery provided by an overly specific offer of proof.
6. Lack of inconvenience, increased costs, or other prejudice to the prosecution.
7. That the defense made no previous request for a continuance, and the case is not unduly old.
8. When the defendant will be ready to proceed.

If a continuance is denied, attempt to elicit the reasons from the court, since a judge's misapprehension of the facts is one of few promising grounds for reversal.[67]

§ 27.2B. CONTESTING A CONTINUANCE

Counsel opposing a continuance should note the speedy trial and other deadlines imposed by a variety of statutes, detailed *supra* at § 27.1B. It is also worth noting that the District Court Standards and case law generally place a difficult burden on the party seeking the continuance (e.g., only in "extraordinary circumstances, not within the control of the parties and not forseeable"[68]); and that an attorney may not ethically move for a continuance that is designed to harass or injure someone[69] or that is based on misrepresentations.[70] Indeed, Mass. R. Prof. C. 3.2 provides that "a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

The Commonwealth's unpreparedness, especially if repeated, may warrant a dismissal even where no speedy-trial violation is present.[71] If the court finds a speedy-

[67] *See, e.g.,* Commonwealth v. Cavanaugh, 371 Mass. 46, 50–57 & n.6 (1976).

[68] Standards of Judicial Practice: Caseflow Management, Standard 3:02 (District Court Administrative Office, June 1980). *See* discussion of criteria and excerpts from Standard 3:02 *supra* at § 27.1A.

[69] Mass. R. Prof. C. 3.4; *see also* former S.J.C. Rule 3:07, DR 7-102(A)(1).

[70] Mass. R. Prof. C. 3.2 (expediting litigation); *see also* former S.J.C. Rule 3:08, PF 2 (prosecutor's duty not to mislead court to obtain a continuance) and DF 2 (defense counsel's duty).

[71] Commonwealth v. Pomerleau, 13 Mass. App. Ct. 530, 536–37 (1982) (dismissal without prejudice within court's discretion although no speedy-trial violation). *See also* Commonwealth v. Super, 431 Mass. 492, 496 (2000) (upholding the grant of defendant's motion for required finding of not guilty where the prosecutor, following denial of Commonwealth's motion for continuance, declined to make opening statement and refused to call any witnesses or put on any evidence) and Commonwealth v. Burston, 77 Mass. App. Ct. 411, 417 (2010) (denied Commonwealth's motion to continue where prosecutor failed to exercise due diligence to produce Commonwealth's witnesses for scheduled suppression hearing).

trial violation, it must dismiss the case with prejudice;[72] and it may find a speedy-trial violation if the Commonwealth has been unreasonably dilatory, even in the absence of prejudice and even if Mass. R. Crim. P. 36(c) is not violated, under its inherent power.[73] Any dismissal over the Commonwealth's objection must be based on written findings after a hearing.[74]

If the Commonwealth succeeds in obtaining a continuance, defense counsel should consider moving for an order that the prosecution receive no further continuances. While such an order does not bind a subsequent judge,[75] it does improve the defendant's chances for a dismissal should the situation recur. Additionally, imposition of costs is appropriate if the Commonwealth's tardiness in notifying defense counsel resulted in unnecessary expenses.

On occasion the Commonwealth has "nol prossed" a case when its continuance motion was denied. Because jeopardy has not yet attached, theoretically a complaint could be brought a second time[76] and the denial of a continuance effectively evaded. In one such case, the Supreme Judicial Court held the nolle prosequi to be a nullity and found that subsequently reviving the case denied the defendant his right to a speedy trial.[77]

§ 27.2C. SPEEDY-TRIAL CONSIDERATIONS

Before seeking a continuance, counsel should consider that it may undermine her client's right to a speedy trial or to a dismissal for lack of speedy trial in the future.[78] Moreover, a continuance requested by the defense stops the speedy-trial clock,

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[72] Commonwealth v. Pomerleau, 13 Mass. App. Ct. 530, 533 (1982) (citing Barker v. Wingo, 407 U.S. 514, 522 (1972)).

[73] Commonwealth v. Balliro, 385 Mass. 618, 623–24 (1982).

[74] Commonwealth v. Brandano, 359 Mass. 332, 337 (1971). See fuller description of these requirements *infra* at § 39.5D and *supra* § 7.8. Additionally, a dismissal must be grounded on a legal basis and cannot be simply a discretionary decision as to what is worth prosecuting, or it unconstitutionally invades the prosecution function. Commonwealth v. Gordon, 410 Mass. 498 (1991). *See also* Commonwealth v. Taylor, 428 Mass. 623 (1999) (grant of one year pretrial continuance cannot be based solely on desire by court to impede prosecution of case); Commonwealth v. Connelly, 418 Mass. 37 (1994) (reversing order of dismissal with prejudice which had been based on failure of Commonwealth to be ready for trial where defendant had, on prior date, requested a continuance when Commonwealth's witness had been present and prosecutor's conduct was not "egregious").

[75] Commonwealth v. Carrunchio, 20 Mass. App. Ct. 943 (1985) (rescript).

[76] Mass. R. Crim. P. 16(b); Commonwealth v. Massod, 350 Mass. 745, 748–50 (1966).

[77] Commonwealth v. Thomas, 353 Mass. 429 (1967). *Cf.* Commonwealth v. Super, 431 Mass. 492, 496 (2000) (upholding the grant of defendant's motion for required finding of not guilty where the prosecutor, following denial of Commonwealth's motion for continuance, declined to make opening statement and refused to call any witnesses or put on any evidence).

[78] For instance, two factors the court may consider in determining whether to dismiss for prejudicial delay of less than twelve months are the defendant's assertion of the right to a speedy trial, and the prejudice he has suffered. Barker v. Wingo, 407 U.S. 514 (1972). *Cf.* United States v. Huguenin, 950 F.2d 23 (1991) (unless speedy trial objection is raised before trial by motion to dismiss, it is deemed waived). Mass. R. Crim. P. 36(c) does not include "assertion of the right" as a factor, however. *See* full discussion *supra* at § 23.2D.

becoming an "excluded period" that delays the twelve month deadline.[79] Judges have been advised to warn defendants seeking a continuance of this fact.[80]

When the Commonwealth moves for a continuance, the speedy- trial clock keeps running unless (1) the court makes an explicit finding, supported by reasons, that the ends of justice outweigh speedy- trial concerns[81] or (2) in certain circumstances, the defendant does not object to the continuance.[82]

§ 27.3 COSTS

According to Rule 10(b), when a continuance is granted to the Commonwealth or defendant, the court may assess costs against that party or its counsel to compensate the adverse party for any expenses caused by failure to provide adequate notice. Such costs might include lost wages, extra compensation to police officers attributable to court attendance, stenographer's fees, witnesses' fees, and travel costs.

The only costs contemplated by Rule 10 are those that result from the party's tardiness in requesting a continuance. Costs are not appropriate when adequate notice was given, grounds were not discovered in time to provide adequate notice, or the continuance was necessitated by improper conduct by the adverse party.[83]

§ 27.4 PRESERVATION OF TESTIMONY

In "exceptional circumstances," the judge may condition the granting of a continuance on the taking of testimony of a witness then present in court. The transcript could then later be used at trial or any other proceeding, as both parties had an opportunity to examine the witness at the time the continuance motion was granted.[84]

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[79] Mass. R. Crim. P. 36(b)(2)(F). *See supra* § 23.2B(6).

[80] *See* Commonwealth v. McCants, 20 Mass. App. Ct. 294, 301 n.8, *rev. denied*, 396 Mass. 1102 (1985); Commonwealth v. Alexander, 371 Mass. 726, 731 (1977); Commonwealth v. Fields, 371 Mass. 274, 280 n.8 (1976).

[81] Mass. R. Crim. P. 36(b)(2)(F). This provision incorporates prior law. *See* Commonwealth v. Ambers, 4 Mass. App. Ct. 647 (1976); Commonwealth v. Fields, 371 Mass. 274, 282 n.8 (1976); Commonwealth v. Boyd, 367 Mass. 169, 179 (1975); Commonwealth v. Loftis, 361 Mass. 545, 549 (1972).

[82] Commonwealth v. Dias, 405 Mass. 131, 139 (1989) (defense counsel has obligation to object to delay caused by continuance); Commonwealth v. Stevenson, 22 Mass. App. Ct. 963, *rev. denied*, 398 Mass. 1104 (1986); Commonwealth v. Domingue, 18 Mass. App. Ct. 987 (1984), *rev. denied*, 393 Mass. 1105 (1985); Barry v. Commonwealth, 390 Mass. 285 (1983); Commonwealth v. Farris, 390 Mass. 300 (1983). But even if the defense registers no objection, a continuance to file a conference report is not excludable because it is required by rules of court. Commonwealth v. Healy, 26 Mass. App. Ct. 990 (1988); Commonwealth v. Corbin, 25 Mass. App. Ct. 977, *rev. denied*, 402 Mass. 1102 (1988).

See also Commonwealth v. Campbell, 401 Mass. 698 (1988), in which a continuance period was not excluded from the speedy-trial clock even though the defendant had agreed to it, because the agreement was based on misleading statements from the prosecutor that a plea would be accepted.

[83] Reporter's Notes to Mass. R. Crim. P. 10.

[84] Failure to provide the defense a full opportunity to cross-examine at a pretrial deposition renders that deposition inadmissible at trial. Commonwealth v. DiBenedetto, 414

The expenses of taking and transcribing the testimony are assessed as costs against the party seeking the continuance.

Because courts do not favor piecemeal trials, Rule 10's "preservation of testimony" clause is generally not utilized except in special circumstances (such as an out-of-state witness, or, as required by statute, a witness in certain motor vehicle and insurance fraud cases).[85] If defense counsel obtains the agreement of the prosecutor in advance of his continuance, the prosecutor will notify his witnesses not to appear on the original date and there will be no possible testimony to preserve.

Mass. 37 (1993); Commonwealth v. Tanso, 411 Mass. 640 (1992). Other provisions providing for the preservation of testimony are Mass. R. Crim. P. 6(d) (preservation of testimony on default) and Mass. R. Crim. P. 35 (depositions to perpetuate testimony). *See also supra* section 16.5D.

[85] G.L. c. 278, § 6A, requires the court to take the testimony of a witness then in court as a condition for granting a continuance in cases brought under G.L. c. 266, §§ 27A (defrauding insurer by concealing a motor vehicle), 28 (receiving, stealing, or maliciously damaging a motor vehicle), 29 (restitution proceedings after conviction under sec. 28), 111A (fraudulent claimed loss to insurer), and 139 (alteration of motor vehicle identification number, sale of vehicle with altered numbers, etc.).