MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS

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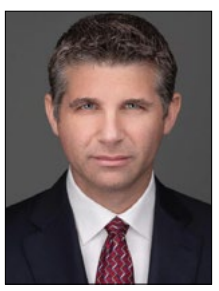
President's Message

There's no substitute for practice

By Marc A. Diller

People's avoidance of in-person trials following COVID is the rear-view. Many advocates are rusty or inexperienced or afraid.

How do trial lawyers counter those concerns as they prepare to get back to trying cases regularly?



There is no substitute for practical experience. You can't learn to be a trial lawyer simply by reading and/or by observing other skilled trial lawyers. You need "reps." You need to get up on your feet and do it. Sometimes, the risks are too high if the only reps are occurring live "in-trial."

At the beginning of my term as president, I announced, "I hope to improve the on-your-feet trial practice training of our membership. I've observed many of my colleagues refuse to deploy certain tools available to us during trial practice. I suspect that it's not because we don't want to do it. Rather, I suspect that it's because we've never tried it. We've never practiced it. Practical, on our feet training, can help address that problem."

Since COVID, much of our professional learning has been in an online seminar format. With experienced lawyers talking at us, we have engaged in passive learning. While this method has its benefits, it lacks the interactive and practical elements that are crucial for trial practice.

To maximize our potential, we need to engage more in active, on-our-feet, boot camp-like training.

By the time this article is published, our MATA colleagues will have completed two successful on-your-feet training/workshops with a third scheduled to occur in April.

Many of our MATA members showed up not only to learn from the expert speakers and retired Massachusetts Judges, but also each member got individualized attention during interactive training sessions and breakout workshops.

- Jury Selection Training: Held at Suffolk Law School, this session armed our members with the skills needed to conduct effective and acceptable voir dire. The panel of experts and coaches included former Massachusetts Judges. Participants had the opportunity to listen to experts and then broke out into smaller groups where everyone got on their feet practice and live feedback from experienced trial

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EDITOR'S NOTE

There is no magic 93A letter

By Jonathan A. Karon

The magic 93A letter doesn't exist. Periodically on the MATA list-serve or when discussing a case at virtual coffee, someone will ask something along the lines of the following:

"I have a great case on liability and the insurance company isn't even offering the medical bills. I figure I should send them a 93A/176D letter to get them to settle. Does anyone have some good examples?"

If you find yourself about to ask that question, please STOP! There is no magic 93A letter that will settle your case. If the insurance company makes a lousy offer you have to put your case in suit and be ready, willing and able to try it. That's the only way you're going to get a decent offer and it's always possible they'll make you try your case.

There are at least three reasons why sending a pre-suit 93A letter is unlikely to settle your personal injury case.

First, the law isn't that helpful for holding insurers liable merely for making a low ball offer. Initially, you'd think this would be rather straightforward. Mass. Gen. Laws Ch. 176D Section 3(9)(f) prohibits "failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." and 3(9)(g) prohibits compelling insureds to institute litigation to recover amounts due by offering substantially less than the amounts ultimately recovered in such an action. One of the purposes of that provision is to prohibit the practice of "low-balling, i.e., offering much less than a case is worth...where liability is either clear or highly likely." Guity v. Commerce Insurance Co., 36 Mass. App. Ct. 339, 343 (1994).

But here's the catch. It's not enough to prove that the jury or judge eventually awarded substantially more than what was offered. Parker v. D'Avolio, 40 Mass. App. Ct. 394 (1996) was a case where the minor plaintiff allegedly sustained neuropsychological deficits from ingesting lead paint. In response

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Take control post-litigation

By William Rothrock

In the early days of the structured settlements, the only people who could participate in helping the plaintiff's client were the defense's broker.

The insurance company refused to recognize the existence of a plaintiff's representative. Very slowly, using a plaintiff broker reluctantly became an industry standard, but many original defense controls remained in force.

These industry controls include, but are not limited to, whether you and your client can utilize a structured settlement. This year, I helped a family establish a life care plan for their child injured during birth, which utilized a structured settlement to fund the trust. The defense attorney flatly refused to allow the use of a structured settlement.

You read that right.

The one product specifically designed to meet this child's lifetime needs was disallowed for no supportable reason. They did not politely state that they never agreed to it at mediation. I could use some crude fitting expletives to describe this female defense attorney, but I will not drop to her level.

Plus, I think this approach works better. I am educating her opponents on avoiding her lack of empathy by doing the following in writing before you commence with a mediation.

1. State you reserve the right to use a structured settlement for you and your client.
2. You will use an A+-rated company.
3. They will cooperate with your structured settlement broker or settlement consultant to effectuate the structured settlement.
4. They will fund the structured settlement within 30 days of mediation.

Making a structured settlement with additional considerations is detrimental to your client. The only guaranteed option should be available for all injured clients, especially those

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Self-care in solidarity

By Sarah Crossen

When we discuss well-being and self-care, we often idolize solitude. We're commonly told that self-care is a quiet meditation, a walk in the woods, unplugging from your devices, taking a deep breath, getting a good night's sleep, repeating a positive affirmation. Even as we begin having more open conversations about the importance of mental health and attempt to normalize discussing our struggles, we still turn too often to out-of-sight solutions.

There is, of course, nothing wrong with a deep breath and a moment to center yourself. Many of us need time to recharge and reengage with the people and the problems around us. But lately, I've been rethinking what it means to do these things alone.

As much as we might try to turn it off and tune it out, we are bombarded by trauma. The trauma of invasions, the downfall of democratic institutions, the degradation of basic human rights, the reversal of decades of hard-earned progress. And I worry, as many of us do. I worry for myself, as a young woman and LGBTQ+ attorney, as I watch our highest court ponder granting and taking away my right to get married just within my lifetime. I worry for my fiancée, as I watch her Ukrainian hometown under the threat of constant terror. I worry for my family, given and chosen. For my Black and brown and transgender and undocumented friends. For my community. For my clients.

And what I feel and see in myself and in conversations with all of you, is the realization that "going it alone" just isn't going to cut it. The deep breaths and quiet meditations and escapism may be necessary, but they are not enough. There is too much worry, too much trauma, too much anger and fear. We cannot hold it or quiet it on our own, we must carry it together.

I have the great fortune of working alongside genuine, kind people who I deeply admire. People who hold me up, and guide me, and let me be me. Alongside clients who are my neighbors, who know my community, who are guided by a shared sense of justice. Alongside community partners who dream big and encourage me to reimagine the limits of our society and our systems. It is among them that I feel most protected, most empowered, most loved, most joyful, and most free.

That is why instead of recommending solitary self-care, I'm proposing we reimagine self-care in solidarity with one another. In the spirit of community well-being and solidarity as a form of self-care, let me offer just a few suggestions on how we, as legal professionals, can contribute to and foster our collective well-being in our workplaces, in our legal community, and in our broader community:

1. In our workplaces

First, we can hold space in our workplaces and collaborative spaces for the worry. We are often busy, overwhelmed, and under pressure. Still, we can choose to intentionally make space and give time to these feelings, our worries, and our common struggle. These struggles are often much easier to bear when said out loud and held collectively. On a more personal note, I offer this example: when Russian forces escalated the invasion of Ukraine in 2022, tragically three years ago this February, my fiancée and I struggled to continue day to day as if it was business as usual while air raid sirens continuously sounded in her hometown, as her parents lost friends, and as we waited to hear if her family was okay. Many of us feel the same when we lose

loved ones or are faced with events like this that hit so close to home; it's hard to go on as if everything is the same. My family didn't expect grand solutions or gestures, but we were lighter in the few moments where others intentionally recognized that the world was bigger than our meeting agenda, acknowledged the worry and the pain, and stood in it and held it with us. In Ukraine, the violence continues, yet with it we've seen the incredible resilience, love, and life of the Ukrainian people. What a beautiful example of what people are capable of shouldering, together.

2. In our legal community

Second, we can choose to take the time to see the people we work alongside, and the context in which we come to know them, in the broader framework of the movement towards a more just and fair society. I firmly believe that our work representing clients-- in personal injury, or employment, or immigration, or wherever we meet our clients-- is social justice work. Regardless of who we represent, legal professionals, our peers, and our clients, all exist in this beautiful, difficult world and our paths most often cross when our systems and society fail. All the ways in which our clients struggle and show up in the world – how they build relationships, love one another, feel joy and hope, persist in struggle – are case-related. We can make space for their struggle, hold it in community with one another, and face it together in whatever small way we can. Our work together, towards justice, is the same work and the same cause which drives community activists and political movements. In this context, working with our clients, we see that our clients do not struggle alone, we do not hold their burden alone, and we do not have to solve every problem on our own or in our own narrow lane.

3. In our broader community

To that end, my final proposal is that we reach out to community partners and expand our solidarity. If we see our work in context, and see our clients, coworkers, and collaborators in their context, we see an ever-expanding community of activists, advocates, and champions aligned with our cause. Their work is our work, and we should seek to support it and be in community with it wherever possible. The broader our reach, and the greater the community holding up the worry, the lighter and lighter the burden of going it alone. I, for one, feel lighter working alongside those who share my determination to achieve a more just, equitable, and free world.

In times like this I can't always escape to the woods and feel still; I need to "do." Perhaps that's the advocate in me, what led me to this work. I suspect many others feel the same. These are just some ideas of how we might reimagine our work and seek wellness in community with one another. I'm sure we can think of bigger and better things, together.

Sarah Crossen is an Associate at Meehan, Boyle, Black & Bogdanow. She joined the firm as an attorney in 2023 and handles a variety of the firm's negligence claims, including those stemming from motor vehicle collisions, medical malpractice, premises liability, and dangerous and defective products.

An appellate roadmap, Part 11

By Kevin J. Powers

Prior parts of this series appeared in prior MATA Journal issues, beginning in June 2020.

XVI. Record Appendix: Procedural Requirements

A.Deadline 1: Not later than 14 days after receiving notice of assembly of record from trial court clerk: Appellant shall serve designation of parts of record to include in appendix and statement of issues.

Cooperate and agree upon record appendix contents. "The parties are encouraged to agree as to the contents of the appendix." Mass. R. App. P. 18(b)(1). Few disagreements between counsel can try the patience of an appellate clerk's office so much as disputes over the contents of the record appendix. Counsel should bear in mind that, absent a trial court motion for new trial or a motion specifically directed at enlarging or correcting the trial court record, the trial court record is set and established by the time that the appellant files his or her notice of appeal. Consequently, the contents of the record appendix are not a legitimate subject of gunboat diplomacy, brinksmanship, or "gotcha" tactics. Neither party should attempt to hide unfavorable portions of the record, and neither party should attempt to import material from outside of the record.

Skirmishes regarding the contents of the record appendix not only are generally beneath the dignity of the court, but are also generally fruitless. See Mass. R. App. P. 8(e)(1) (rectification of record omissions); Mass. R. App. P. 8(e)(2) (correction of any part of record); Mass. R. App. P. 18(a)(1)(D) (appellate court may rely on portions of record not included in appendix). As a best practice, parties should not rely upon the appellate court ordering transmission of a missing exhibit, but parties also should not play hide-the-ball under the unfounded assumption that an appellate court will not ferret out record evidence concealed from it by a less-than-forthcoming party.

Timing of appellant's designations. "In the absence of agreement, the appellant shall, not later than 14 days after receiving from the clerk of the lower court the notice of assembly of the record, serve on the appellee a designation of the parts of the record which the appellant intends to include in the appendix and a statement of the issues which the appellant intends to present for review." Mass. R. App. P. 18(b)(1).

Relative practicality or impracticality of deadline. This relatively early deadline may be more practical in some cases than in others. Counsel, in researching and drafting a brief, may recognize the necessity of including additional parts of the record not included in an earlier designation, or may recognize that some parts of the record included in an earlier designation are not necessary. The possibility that counsel's evolving understanding of the issues may justify modification of an earlier designation should motivate all counsel to use collegial communication to agree upon the record, rather than acting on pettiness and attempting to bind each other to an earlier, preliminary designation. For the same reason, the parties may do well to mutually agree to postpone designation until some halfway point during the drafting of the appellant's brief. This sort of flexibility is an art rather than a science. Where counsel has the impression that opposing counsel may attempt to rigidly bind counsel to an earlier, preliminary designation, counsel should condition that earlier, preliminary designation as "subject to amendment," etc.

Statement of issues necessary. The appellant must provide the appellee with a statement of issues in order for the appellee to reasonably assess whether additional record materials may be necessary in order for the appellate court to review those issues.

State impoundment where applicable. "Where a party designates as part of the record any matter that has been impounded or has been made confidential by statute, rule, or order, the designation shall so state." Mass. R. App. P. 18(b)(2).

Appellant generally pays cost. "Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant." Mass. R. App. P. 18(b)(3).

Cost of appendix taxed as costs. "The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily, the court may impose the cost of producing such parts on the party." Mass. R. App. P. 18(b)(3).

B.Deadline 2: Within 14 days after receipt of designation: Appellee shall serve designation of necessary additional parts of record.

Timing of appellee's designations. "If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, the

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There is no magic 93A letter

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to plaintiff's Ch. 93A demand letter (for violating the lead paint statute) the defendants offered the statutory $25. The jury awarded the plaintiff $1,250,000 which the judge doubled for bad faith failure to make a reasonable settlement offer. The Appeals Court reversed the 93A judgment because, before responding to the demand letter, the defendants had an expert pediatric neurologist who, after reviewing the child's records, concluded that the plaintiff hadn't suffered any significant effects from lead paint exposure. That the jury didn't believe the defense expert's testimony and awarded over a million dollars didn't make the $25 settlement offer unreasonable. The Appeals Court concluded "in a complex factual and legal entanglement such as this, it would be grossly unfair to bring down the potent weaponry of chapter 93A upon one who may guess wrongly about what a court will ultimately do with the problem." Id. at 403 (citation omitted). This is not to say that you can't win a bad faith failure-to-settle case, but you will have to show that the insurer either didn't believe or didn't have a reasonable basis for believing, that there was a valid defense.

Second, unless you get a judgment in the underlying tort claim, your damages aren't very good. In the absence of a judgment, your damages are limited to loss of use of the money, from the time that the insurer should have made a reasonable settlement offer until you were paid. Clegg v. Butler, 424 Mass. 413, 424-425 (1997). Moreover, the Court can, but doesn't have to, assess interest at the Massachusetts statutory pre-judgment rate of 12%. A useful discussion is set forth in Rivera v. Commerce Insurance Co., 84 Mass. App. Ct. 146 (2013). Of course, you would still be entitled to attorney's fees in litigating the 93A case, which may be nothing to sneeze at, but generally for the insurer to get meaningfully whacked, you're going to have to take the underlying tort case to verdict.

Third, and most importantly, they don't believe you'll file, must less try, a 93A/176D case. Step back and think about the psychology involved. You've sent the insurance company medical records, bills and any other necessary documentation of liability and damages. They respond with a lousy offer. So, instead of filing suit, you send them another letter, which essentially says, "okay, you're violating Ch. 93A, if you don't pay my client what their case is worth, I'll sue you, this time I really mean it." Sorry, but they don't believe you. They don't believe you're serious about filing suit, taking that case to verdict and then litigating the Ch. 93A case to verdict. What it signals (accurately or not) is that the lawyer doesn't want to file suit and desperately hopes the case can be settled by sending "the magic letter". Which it can't, because the magic letter doesn't exist.

But here's the good news. If used correctly, the Ch. 93A/176D letter can be a powerful weapon. It's far more powerful if sent after you've filed suit. Once you've filed suit, the insurance company knows you're serious and they will either have to pay your client what their case is worth or take the case to trial. Now if the case is defensible, then there's no point in sending a Ch. 93A/176D letter. But, if fault can't reasonably be disputed (for example when your client is a passenger or the victim of a dog attack) and the causally related damages are well documented, then you can send the 93A letter. Now the insurance company has a choice, they can settle your case or let you try it to verdict, where you'll be playing for double or triple damages. You may still have to try your case, but if you do, the risks to the insurance company and your client's possible rewards have increased substantially.

So, there's no magic Ch. 93A letter that will settle your case. What will settle your case, if it can be settled, is you being willing to try it. Which is how it should be. After all, trials are the fun part.

Jonathan A. Karon, the editor-in chief of the MATA Journal, is a past president of MATA. He is the founder of Karon Law, LLC. In his national practice, he represents the catastrophically injured, including cases involving traumatic brain injuries, amusement ride accidents and defective products. He can be reached at (617)405-3200 or at jakaron@karonlaw.net.

There's no substitute for practice

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***MARC ADAM DILLER** is the managing partner of Diller Law, LLP. He concentrates his practice on plaintiff side catastrophic bodily injury cases including wrongful death, construction site injuries, dangerous premises, products liability, truck, motorcycle and car crash related injuries. Mr. Diller also serves as a trial consultant to other well-respected trial attorneys. He additionally serves on the Judicial Administration Section Council of the MBA. Mr. Diller has received numerous professional recognitions including being selected for eight (8) consecutive years to Super Lawyers Top 100 lawyers in MA and for the past four years, Marc was voted in Massachusetts Lawyers' Weekly Reader Rankings as the top jury/trial consultant in MA. Mr. Diller is a graduate of Suffolk Law School and The University of Michigan, Ann Arbor.*

lawyers and judges.

• Opening Statements Workshop: This workshop, held at Middlesex Superior Court in Woburn, featured expert presentations in the morning including Leo Boyle, followed by hands-on practice sessions in the afternoon. Participants had the opportunity to present their opening statements and to receive individualized feedback from experienced trial attorneys.

We have more exciting programs planned for the future, including sessions on examinations, closing arguments, depositions, and mediations.

Next time we're called to trial, remember it is the **practice**, not the perfection, of law. There's no substitute for practice.

Take control post-litigation

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with a life expectancy of more than 20 years. After this time, distribution assets can be significantly affected by fees and taxes.

Using an A+-rated company alleviates any concerns the insurer or self-insured parties may have after litigation. The defense receives a release, a qualified assignment and release, and often court approval to extinguish liability. Asking for anything else is an attempt to maintain control over you and the client.

What other items might the defense deem appropriate to demand? Using their broker or the 60-90-day funding period, post-court approval comes to mind.

While many reputable defense brokers add value to the defense, they should also be considered defense professionals. Does paying the defense broker from your client settlement make sense to you? If a defense broker is needed, then the defense should pay for them, in my opinion.

Binding the defense to cooperate with your advisor ensures they have the necessary control to expedite the case's resolution. Frequently, withholding funds until an agreement on the defense stipulation is reached may be more important than the client's desire to move on with their life, especially when considering the need for billable hours.

Lastly, the defense argues against providing funding within 30 days or only after court approval. They may state various reasons, but the reality is that the longer they hold your client's money, the more interest they accumulate — interest that legally is your client's.

After consulting with my colleagues, none could recall when the court refused to use a structured settlement. There were only a few instances where the court increased the initial amount allocated to the structured settlement. In the rare event that a structured settlement was declined, the A+-rated carrier would return the funds they held to the insurer.

When I entered the trust profession in the 1990s, it was common to transfer hundreds of millions of dollars daily. However, insurance carriers that set aside funds for reserves long before mediation now seem unable to transfer smaller amounts thirty years later.

As the plaintiff's attorney, you can end these outdated practices of a defense-controlled system that continue to hold your client hostage. In my opinion, these practices should stop. I would be very interested in hearing your thoughts.

William Rothrock, CSSC, is a highly regarded author of numerous peer-reviewed articles that expertly highlight the vital intersection of finance and law. His unwavering commitment to empowering the legal profession equips attorneys to effectively navigate complex financial landscapes and safeguard their clients' financial futures.

An appellate roadmap, Part 11

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appellee shall, within 14 days after receipt of the designation, serve upon the appellant a designation of those parts." Mass. R. App. P. 18(b)(1).

Appellee pays for inclusion of unnecessary parts of record. "[I]f the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented the appellant may so advise the appellee and the appellee shall advance the cost of including such parts." Mass. R. App. P. 18(b)(3).

Lower court resolves disputes regarding appendix scope and cost. "In the event of a dispute as to the parts to be included or the cost advance required to include them, the matter shall be settled by the lower court on motion and notice." Mass. R. App. P. 18(b)(3). Notwithstanding that court resolution of these disputes is occasionally necessary, such occasions are always unfortunate and always represent a failure of one or both parties to rise to the level of collegiality toward which the courts hope that all litigants—or, at the very least, all counsel—will aspire.

Kevin J. Powers, a sole practitioner in Mansfield, has been active in the Massachusetts appellate bar since 2006, a member of MATA's Amicus Committee since 2017, Interim Chair of the Amicus Committee from 2018 to 2019, and current Vice Chair of the Amicus Committee. His reported decisions include Meyer v. Veolia Energy North America, *482 Mass. 208 (2019), and he has co-written or edited many of MATA's recent amicus filings. His article Forging an Effective Appellate Brief appears in the January 2023 issue of Trial Magazine, and his article The Legal Writing Code appears in the January 2024 issue of Trial Magazine. He can be reached at kpowers@kevinpowerslaw.com.*

C.Deadline 3: Concurrent with appellant filing opening brief: Appellant shall file and serve appendix.

Appendix concurrent with appellee's opening brief. "The appellant/cross-appellee shall serve and file a brief and appendix within 40 days after the date on which the appeal is docketed in the appellate court." Mass. R. App. P. 19(b)(1).

D.Deadline 4: Prior to filing of appellee's brief: Appellee intending to file supplemental appendix must move for leave.

Supplemental appendix disfavored, and motion for leave necessary. "Except with leave of the appellate court or a single justice granted on motion, an appellee or cross-appellee in a civil case shall not file a supplemental appendix." Mass. R. App. P. 18(b)(5). In many instances, a motion to file a supplemental appendix represents a failure of the parties to cooperate and to agree upon the contents of a single record appendix. When a supplemental appendix is truly necessary, the appellee must move for leave to file it.

Rule-based exception for cross-appeals. Although Mass. R. App. P. 19(a)(2) does not contemplate that the appellee will file an appendix in a case not involving a cross-appeal, Mass. R. App. P. 19(b)(2) does contemplate that the appellee/cross-appellant will file an appendix in a case involving a cross-appeal. This may reflect or create some conceptual separation between the appeal, which opens in briefing with the appellant/cross-appellee's filing of his or her opening brief, and the cross-appeal, which opens in briefing with the appellee/cross-appellant's filing of his or her opening brief. Nonetheless, the best practice is for the parties, even in a case involving a cross-appeal, to set aside any trial court acrimony, agree upon a single record appendix, and mutually agree upon a reasonable division of any likely-minimal costs involved in preparing that single record appendix in this age of PDF files and minimal paper copying.

Logical exception for pro se *appeals*. Another instance in which a supplemental appendix often becomes necessary is the *pro se* appeal. *Pro se* litigants often do not understand the limited nature of the record on appeal, *i.e.*, the appellate court may only consider evidence already before the trial court. Further, *pro se* litigants may intentionally or inadvertently omit entire exhibits or entire volumes of transcript, omit pages of exhibits or pages of a transcript volume, or may use draft versions of documents inconsistent with the versions of those documents admitted at trial, *e.g.*, an unsigned Microsoft Word word-processor draft of a document only admitted in its final, signed form at trial. Consequently, *pro se* appellants often file defective record appendices and represented appellees often need to file supplemental appendices in order to provide the appellate court with an accurate record. In this instance, a supplemental appendix may be well-justified more often than not. The Massachusetts Appeals Court Informal Brief Pilot Program, launched in late 2023, anticipates this and waives the requirement of a motion for leave. See, *e.g.*, Massachusetts Appeals Court Informal Brief Pilot Program, Informal Brief Guidance (d)(3) ("In any case where an appellant has filed an informal brief, any appellee (including an appellee who is self-represented or represented by counsel) is automatically granted leave of the Appeals Court ordinarily required by Mass. R. [App.] P. 18 (b)(5) to file a record appendix, which will be called the 'supplemental appendix'" but "[a]n appellant filing an informal reply brief may not include a supplemental record appendix with the reply brief").

E.Deadline 5: Concurrent with appellee filing appellee's brief: Appellee shall file and serve any supplemental appendix.

Concurrent with brief. "Where such leave is granted, the [supplemental] appendix shall (A) be filed and served with the brief pursuant to [Mass. R. App. P.] 18(f) and [Mass. R. App. P.] 19, unless otherwise ordered." Mass. R. App. P. 18(b)(5). See Mass. R. App. P. 18(f) ("Any appendix, including exhibits and transcripts or portions thereof in a civil case, shall be filed and served with the brief in accordance with Rule 19.").

Limitations of supplemental appendix. Any supplemental appendix must "(B) include only materials that are part of the record; (C) not generally include materials already in the appellant's appendix, unless necessary for context; and (D) be in the form prescribed by [Mass. R. App. P.] 18(a)(1) and [Mass. R. App. P.] 20(a)(5) and [Mass. R. App. P. 20](a)(6)."

F.Deadline 6: When good cause arises: Party shall move for leave to file amended appendix volume.

On motion for good cause. "On motion for good cause, the court may grant leave for a party to file an amended appendix volume. The motion shall describe the nature and reason for the amendment." Mass. R. App. P. 18(g).

File motion and amended appendix volume. "The party shall file with the motion the amended appendix volume marked as such on the front page or cover." Mass. R. App. P. 18(g).

Filing deadlines stand. "Except as the court otherwise orders, the filing of an amended appendix volume has no effect on any filing deadlines." Mass. R. App. P. 18(g).

Virtual Coffee Hour On-Demand

By Jonathan A. Karon

Since the COVID lockdown, I've had the pleasure of moderating MATA's virtual coffee hour. If you're not familiar with it, every Friday at 10 a.m. approximately 25-40 MATA members log in and introduce themselves, then a speaker presents on a topic for 10-15 minutes. After that, we open it up for comments and questions. The topics have included trial practice, lawyer well-being and marketing your practice. Paul Dullea circulates the Zoom link and topic each week on the MATA list-serve. The first Friday of every month is reserved for a case workshop where members can roundtable their case issues or problems.

It's more fun if you can make it in person, but we all have law practices, so it's not always possible. The good news is that most of our virtual coffee hours are recorded and can be viewed through MATA's web site. Members just need to sign in, click on "Education" go to "CLE Materials" and then click on "Friday Roundtable Recordings". You'll see a clickable list of available recordings. For the past year, these included: A panel on conducting voir dire with Marc Diller, Matt Fogelman, Chet Tennyson and yours truly; Scott Fugate, President of Streamlined Record Retrieval, on new requirements for requesting medical records; Tim Lowney on how to obtain street camera footage; Adam Bemporad with on-line research tips; Melissa Jones of Planet Depos on AI in depositions and litigation technology; Laura Mangini and John Rossi on handling arbitrations; a question and answer session on A/V issues with Ian McWilliams (a/k/a Captain Video); a panel on how small firms and solos can handle big cases with Allison MacLellan, Ken Kolpan and Andy Nebenzahl; and presentations on spoliation motions and on precluding defense biomechanical experts.

We also have nationally known speakers from around the country. So, you can also watch Paul Byrd from Arkansas on Juror Values; Julian Gomez from Texas on identifying auto products cases; Phil Miller on the Miller Mousetrap deposition strategy and many others.

The above is just a sampling and you should look at the list and see if there's something that interests you. By the way, the best attended virtual coffee hour featured Leo Boyle presenting on "Learning from Losses." If you couln't be there, the recording is available and you need to watch it.

I really encourage you to join us "in person" for MATA's virtual coffee hour. I've made a lot of new friends and learned a lot. But if you can't make it in person, check out the recordings. If there's a topic you'd like to have discussed, drop Paul Dullea or myself an e-mail and we'll try to find someone who knows something about it.

Finally, some shout-outs. First, to Paul Dullea, without whom nothing in MATA, including virtual coffee, happens. Second, to MATA Past President Tom Murphy who has ably filled in as moderator when I can't make it. Third, to everyone who has presented at virtual coffee. Finally, and most importantly to all the MATA members who joined us. Getting to talk, connect and brainstorm with friends and colleagues is what makes virtual coffee special for me.

Washington Update — January 2025

By Linda Lipsen

In response to the horrific fires burning vast swaths of southern California, AAJ's Trial Lawyers Care® program is coordinating with and supporting the efforts of our friends and family at the Consumer Attorneys of California (CAOC) and Consumer Attorney Association of Los Angeles (CAALA).

We're also in contact with the Los Angeles Trial Lawyers' Charities (LATLC) for updates on what is needed the most. Working with LATLC, our Trial Lawyers Care Committee cochairs created an Amazon wish list. Please use it to shop and send supplies to help first responders and displaced residents.

For links related to providing pro bono legal help and making financial contributions for essential supplies for firefighters and fire survivors, please visit our Trial Lawyers Care page.

New year, new battles ahead

The start of a new Congress feels like the first day of school. It will be important for us to build relationships with new members from both sides of the aisle, especially since we will be playing defense for the next two years

This month, Congress is largely focused on hearings related to new cabinet posts. And while our principal issue and mission—preserving the right to trial by jury—is not targeted in Project 2025, we have many areas of concern, in particular, elimination of trial lawyers' cases via preemption.

Ms. Lipsen is Chief Executive Officer of the American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America (ATLA), in April 2010. She joined the organization in 1993 to direct AAJ's Public Affairs department.

Last Congress, the pesticide industry lobbied for immunity for all harm related to any pesticide, which was inserted into two appropriations bills. AAJ worked tirelessly to help defeat such efforts.

These attempts to limit accountability for corporate wrongdoing are happening on the federal and state levels. Last year, Bayer supported legislation in three states that would give complete immunity to pesticide corporations when their products sicken or kill citizens or cause destruction of crops. Bayer's efforts failed. However, it has indicated interest in expanding the immunity campaign to many more states in 2025. We know that Bayer will also try again to include immunity provisions in federal legislation regulations.

The U.S. Chamber also laid out its priorities for the new year in state legislatures, Congress, and before the Advisory Committee, and chief among them is the mandatory disclosure of litigation financing agreements to corporate defendants. This is a one-sided mandate whose only purpose is to provide powerful corporate defendants with a strategic advantage in litigation to the severe detriment of workers, patients, consumers, victims, and survivors.

The U.S. Chamber, which is only one of our opponents, spent $142 million on lobbying in the 118th Congress (compared to AAJ's $10 million). We anticipate they will continue this level of spending in the new Congress.

We are also ready for the trucking industry's indicated priorities—caps on noneconomic damages; establishing a bifurcated trial process in truck crash litigation; limiting scrutiny of a company's dangerous hiring, supervision, and training practices by attributing responsibility solely to the driver; the admissibility of seatbelt use; and eliminating design defect cases against truck and trailer manufacturers.

We are tracking and actively working to counter Uber's legislative efforts to rewrite the rules on agency and vicarious liability, eliminate UIM coverage, and undermine emerging product liability claims. Uber has invested millions in a campaign to cap attorney fees at 20% in Nevada — a precedent it will seek to replicate nationwide if successful.

AAJ is working on a comprehensive strategy to fight all these battles wherever and whenever they arise. While the temptation, especially after a grueling election cycle, is to tune out or tap out in exhaustion—AAJ cannot and will not. The rights of Americans to seek justice and accountability are at stake and AAJ will not back down.

Legal affair

AAJ also has an amicus curiae program that educates the courts on issues important to plaintiff lawyers and their clients' cases and a federal rules program that analyzes proposed changes to the rules governing court procedure and advocates for fair and balanced rules. Updates on each are below.

Amicus CuriaeRecently filed amicus briefs include:

• Zafirov v. Florida Medical Associates, LLC (11th Circuit) — On January 15, AAJ filed an amicus brief urging the Eleventh Circuit Court of Appeals to uphold the constitutionality of the False Claims Act and preserve the right of private plaintiffs to bring qui tam claims, which supplement executive enforcement of important consumer protections and deter corporations from violating federal laws in the future.

• Scoggins v. Menard (6th Circuit) — On December 19, AAJ partnered with Public Justice, the National Women's Law Center, and the National Employment Lawyers Association to file amici curiae brief in support of a survivor of workplace sexual harassment, urging the Sixth Circuit Court of Appeals to hold that the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA) applies to her entire case.

AAJ will file amicus briefs in the following cases, which will have wide-reaching affects for plaintiffs nationwide:

• McBrine v. United States (SCOTUS) — On January 27, AAJ will file an amicus curiae brief in support of a petition for writ of certiorari filed by Camp Lejeune Justice Act (CJLA) plaintiffs who were denied a jury trial by the Eastern District of North Carolina, which has exclusive jurisdiction over their claims. AAJ will urge the Court to take up this important issue and uphold CLJA plaintiffs' rights to trial by jury, which is expressly protected by statute.

• Fuld v. Palestine Liberation Organization (SCOTUS) — On February 4, AAJ will file an amicus curiae brief in support of the family of an American citizen killed during a 2018 terrorist attack in the West Bank carried out by the Palestine Liberation Organization and Palestinian Authority. AAJ's brief will urge the Supreme Court to hold that the consent jurisdiction provision of the Promoting Security and Justice for Victims of Terrorism Act (PSJVTA) does not violate Due Process Clause of the Fifth Amendment to the U.S. Constitution.

For more information or to request AAJ amicus support, please email Legal Affairs or amicus curiae program page.

Federal Rules

There are more than a dozen rules in various stages of consideration, as outlined below.

Rules Scheduled to Become Effective (12/1/25):

• FRCP 16.1 (multidistrict litigation)

• FRCP 26(f)(3)(D) & 16(b)(3)(B) (privilege logs)

Rules in Active Formal Comment Period (ending 2/17/25):

• FRAP 29 (Brief of Amicus Curiae) — Would require expanded disclosure of amici's financial relationships with parties and non-parties; eliminate the party-consent option for filing amicus briefs and impose new content restrictions.

• FRE 801(d)(1)(A) (prior inconsistent statements) — Would provide limited exemption from the hearsay rule for prior inconsistent statements of a testifying witness.

Rules Approved for Formal Comment (starts in August):

• FRCP 41(a) (voluntary dismissal) — Would clarify a circuit split and permit dismissal of some but not all claims in an action. Some circuits have been dismissing all claims.

• FRCP 81(c) (post-removal jury demands) — Would preserve the rights of parties who demanded a jury trial before removal and clarify that FRCP 38 applies in removed cases where no prior jury demand was made.

There are more than 20 rules in informal rulemaking. The following six could be approved in April for formal comment:

• Corporate Disclosures FRCP 7.1

• Remote Testimony FRCP 43 & 45

• Service of Subpoena FRCP 45(b)(1)

• Default Judgment FRCP 55(a) & (b)

• Privacy Protection for Court Filings FRCP 5.2 & CR 49.1

• Artificial Intelligence FRE 707 (New)

Contact Sue Steinman and Kaiya Lyons or visit AAJ's federal rules web page for more information.

We start this year busier than ever and are committed to the work that lies ahead. AAJ is proud to work in conjunction with state and local trial lawyer associations, to share and build upon our successes so that the right to a jury trial is protected, and all plaintiff trial lawyers can win justice for their clients. I welcome your questions and concerns.

CONTACT

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MATA Family Legacy Series Part One: Sugarman and Sugarman

By Sheila Sweeney

The Boston law firm of Sugarman and Sugarman was started by brothers, Paul and Neil Sugarman.

After graduating from law school in 1954 Paul was drafted into the U.S. Army and served in Germany and other locations. Returning home, he took a job with Boston Attorney Nate Fink – who hired him on a temporary basis which eventually became a full-time position for Paul. Known among his peers as a political individual, it was Paul Sugarman who basically started the organization of a legislative group within MATA. He spent many days and nights at the state house, trying to protect the rights of his clients as the "No Fault" legislation passed in 1970 and prior to that, legislation regarding depositions was his focus in 1967. At that time, lawyers were not used to working with the legislators and there were many issues that the plaintiff's bar needed to watch to keep the rights of their clients.

Neil Sugarman served in Vietnam after graduating from law school, returning to Boston in 1967. At that time Paul took over the firm, establishing Sugarman and Sugarman in spring of 1967. Neil Sugarman worked on all types of legislative issues throughout his career, all the while, as Paul did, running their law firm and trying cases. At that time, the issue of "charitable immunity" was being debated in Massachusetts as well as a variety of other legislative issues that basically would limit the rights of plaintiffs' and make it harder for them to access the judicial system.

Sugarman and Sugarman tried many, many cases involving medical malpractice, personal injury and product liability among others. They built their firm on their love of the law, the preservation of the civil justice system and their belief in each other. Their talent and vast expertise as attorneys expanded their firm into one of the best plaintiff's law firms in the area. During all their time as partners and brothers, they never had a dispute over any issues in business and the law.

This is the beginning of a series highlighting several MATA members who have a family tradition of serving the bar and their clients.

Sheila Sweeney is MATA's Director of Public Relations and Development.

Howe Legal, LLC – Lowell, MA

For 60 years, three generations of Howes have practiced law in the Mill City. The late Richard P. Howe was a long time member of MATA and general practitioner who had jury trials for wrongful death, medical malpractice, products liability, patent infringement and murder. During that time, while he practiced law, Richard Howe served 40 years as a Lowell City councilor, including eight terms as mayor. When his daughter, Martha Howe, joined the firm in 1990, her practice was focused entirely on personal injury and she and her late father tried many cases together in State and Federal courts. Martha Howe said "my father was undaunted. He thought nothing of flying to San Franscico for a jury trial against an insurance company in Federal Court." Martha is grateful for the experience she gained with her late father, who stressed the importance of hard work and connections to organizations like MATA. "I became a MATA member because MATA provided support for small practitioners to put up a fight in what is a David and Goliath world with insurance companies", she said. Maintaining deep roots in Lowell, Martha has served as president of The Greater Lowell Bar Association, The Board of Governors for MATA and is currently chair of the Lowell License Commission. One year after her father's death, her nephew Peter Howe's wife, Arielle Howe joined the firm in 2016. According to Arielle, " at least once a week when we are discussing cases, Martha will quote a lesson from her father like 'Never explain' or 'Today will be a good day to get behind us'. Arielle Howe appreciates the history of the firm and has forged her own path as current president of the Greater Lowell Bar, a Panel Attorney for Agespan and a public administrator for Middlesex County. Although the focus of the firm has shifted to Probate Court litigation, including estates and guardianships, the firm continues to handle personal injury matters. The Howes are grateful for the support and many resources of the MATA community.

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Charity and cheer highlight Holiday Ball

On Dec. 3, MATA members and friends gathered at the Boston Harbor Hotel for the annual MATA Holiday Ball. A great time was had by all, and we collected an impressive number of toys for our Toys for Tots drive.

Richard Paterniti, Donna Corcoran, MATA Governor Robert DeLello, Audrey Poore, Erin Thurston, Lauren Shapiro, MATA Past President Timothy Kelleher

Shaun DiSantis, Ryan Abenante, Sarah Howie, Dan Buck, David Mehan

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MATA Past President Warren Fitzgerald, Eric Parker, and MATA Governor Susan Bourque

MATA Past President Jonathan Karon and Kim Karon