Journal

March 2019
Vol. 11, No. 1

President's Message

Protecting the sacred trial by jury

By Thomas R. Murphy

As a great trial lawyer from Braintree wrote into law back in 1780, in "all suits between two or more persons … the parties have the right to a trial by jury; and this method of procedure shall be held sacred…."

Thanks largely to our strong judiciary — such as the Great Chief from Barnstable who said in the middle of the next century that a jury trial affords the best possible "security of public and private rights" and that our "common law rights have grown out of it, and been secured by it" — jury trials are still sacred.

But fast forward to today: because some very persuasive, powerful forces have so tainted the jury pool, the process of picking the audience for this method of procedure has become critically important to maintaining the integrity of the system. We need to expose that taint in order to level the playing field before opening statements.

That is, over the last 50 years the mainstream commercial lobbies (e.g., manufacturing and insurance) have done a masterful job of sullying the image of consumers who are injured at the hands of their constituency and who go to court looking to be made whole.

They've suborned such skepticism in the jury pool that a plaintiff and a defendant do not start on the same footing. Today, a plaintiff starts out two or three steps in the hole, and a defense verdict in a tort case is almost a rebuttable presumption.

I hear the argument that the plaintiffs' bar has brought that stain upon ourselves, with the mass marketing practices that have turned the legal profession into a burgeoning business. While that's probably true in part, lawyers' marketing practices and public image should not jeopardize the rights of individuals, such as your average Peter and Pamela Plaintiff.

Enter voir dire (vwár dír), from the French meaning "to speak the truth," a term people from coast to coast pronounce differently. Most of us in this neck of the woods say something like "vwaa dear," but in New York City it rhymes with "fois gras and beer" and in Dallas it sounds like "more wire."

However one pronounces it, the landmark

Continued on page 6

EDITOR'S NOTE

Do you really need to depose that witness?

By Jonathan A. Karon

When I was a young lawyer, I didn't understand how anyone could cross-examine a witness who hadn't been deposed. A few years later, when I did bar advocate work in the District Court, I learned how.

For readers who haven't had a criminal practice, discovery, at least in the District Court, usually consists of receiving a copy of the police report. So, being a bar advocate taught me a valuable skill. That brings me to today's topic: Do you really need to depose that witness?

Defense lawyers, of course, love depositions, because most of them are being paid by the hour and the insurer is paying for the transcript. But saving money isn't the only, or even the most important, reason for not taking a deposition. There are important strategic considerations in deciding whether to take a deposition. As you might expect, they are different for lay and expert witnesses.

For lay witnesses, my decision tree is as follows. First, is the witness important? By this I simply mean, might they provide testimony that would significantly affect your case? If the answer is no, then why bother? Unfortunately, sometimes you may not know whether they are important without deposing them.

Wavebreakmedia

That leads to the second question. Do you already know what the witness is going to say? If you already have a copy of a report or statement given by the witness, there may be no need to depose them.

In one of my recent cases, the defense deposed the first responders to an event that had occurred two years earlier. I already had copies of the police and EMT reports, which seemed to cover any significant observations. As I anticipated, the witnesses essentially testified that they didn't remember anything other than what was in their reports.

This leads to the third question. Will the witness talk to you? If you're dealing with a potentially important non-party witness, it's generally a good

Continued on page 6

kalinovsky

How to handle an uninsured motorist claim

By Laura D. Mangini

You've spent the past several months collecting your client's medical records and bills, and organizing them into a coherent demand package that takes the uninsured/underinsured adjuster step by step through your client's damages.

Finally, you receive a phone call from the adjuster. But the conversation is not going as expected. The insurer is not properly valuing your client's claim.

Often, the offer is just too low (or, in the case of an underinsured claim, the insurer is of the opinion that your client was fully compensated by the tortfeasor's bodily injury policy). In other cases, the insurer has obtained a medical record review and insists that none of your client's treatment was reasonable or necessary.

Either way, you now have only one option: you must proceed with arbitration. But what do you do if the insurer wants to take an examination under oath ("EUO") or subject your client to an independent medical examination ("IME")?

How do you combat the defense's record review? Should you prepare a written arbitration summary? Are you entitled to pre-arbitration interest? And how do you handle the arbitration itself? Simply put, how do you conduct an arbitration in such a way that your client has the best chance of success?

This article is intended to provide you with practical tips and advice, and hopefully help you navigate your uninsured/underinsured motorist ("UM") claim.[1]

1. Send a written demand for arbitration.

Although a simple task, sending a written demand for arbitration is important for at least two reasons. It formally documents your intent to seek resolution of the claim through mandatory arbitration, and, more importantly, the written demand starts the clock on arbitration interest (more on this later on).

In your demand letter, be sure to include the names of at least three arbitrators you would be amenable to using. Keep in mind that not every arbitrator is ideal for the every case. If you have questions about which arbitrator is the best fit

Continued on page10

MATA Amicus Committee update

By Kevin J. Powers

The MATA Amicus Committee has been busy over the last couple of years, and our labors have borne fruit. Throughout, the keen editorial eye and careful guidance of current MATA President Tom Murphy has been invaluable.

In August 2017, Matthew Fogelman and Danielle Jurema Lederman wrote a brief addressing two issues in *Segal v. Genitrix, LLC* (SJC-12291), a Wage Act case. MATA first addressed whether the lower court erred in holding the defendants individually liable under G.L.c. 149, §148, as "agents having the management" of the company. Then, MATA addressed whether the plaintiff had to pierce the corporate veil in order to recover. Regrettably, the SJC reversed and remanded. *Segal v. Genitrix, LLC*, 478 Mass. 551, 571 (2017). We can't win 'em all.

In October 2017, Mark Itzkowitz, Lisa DeBrosse Johnson, and New England School of Law student Chelsea M. Carlton wrote a brief in *Nguyen v. MIT* (SJC-12329), a wrongful death action involving the suicide of a graduate student. MATA argued that a university whose agents know that a student is at risk of committing suicide owes that student a duty of reasonable care to avoid taking actions that increase that risk.

Additionally, MATA argued that the student had a contract with the school such that the duty to prevent suicide arose under the contract. The SJC responded to this argument, and held that "a university has a special relationship with a student and a corresponding duty to take reasonable measures to prevent his or her suicide" in certain limited circumstances. *Nguyen v. MIT*, 479 Mass. 436, 453-458 (2018).

However, the SJC held that, on the facts of *Nguyen*, the limited circumstances required to give rise to the duty

did not exist and, even if the duty did exist, the defendants did not breach that duty. *Id.* at 458-460. We won the war but lost the battle.

In January 2018, Kristie Ann LaSalle and the undersigned collaborated with Jeff White at the American Association for Justice on a brief in *Correa v. Schoeck* (SJC-12409), a wrongful death action.

MATA and the AAJ jointly urged the SJC to recognize the duty of reasonable care that a pharmacy owes to its customer to notify her physician that her insurer will not pay for her prescription medication without prior authorization.

In a decision that cited several of the authorities that MATA raised in its brief, the SJC recognized that Walgreens had a limited duty to take reasonable steps to notify both the patient and her prescribing physician of the need for prior authorization each time she tried to fill her prescription. *Correa v. Schoek*, 479 Mass. 686, 693 (2018). Walgreens' duty extends no further, however; the pharmacy was not required to follow up on its own or to ensure that the prescribing physician in fact received the notice or completed the prior authorization form. *Id.* at 699-700.

In February 2018, Jeff Beeler wrote a brief in *Lewis v. Rocco Realty Trust* (2017-P-1253), a slip and fall case. MATA's brief supported an appeal from a judgment on the pleadings in a case in which counsel had not complied with the 30-day notice provision of G.L.c. 84, §21.

Though the statute concludes that the failure "to give such notice shall not be a defense under this section unless the defendant proves that he was prejudiced thereby" the trial judge accepted a flimsy one-page affidavit simply claiming, but not proving, prejudice due to the lack of notice. Unfortunately, the Appeals Court affirmed and the SJC denied further appellate review. *Lewis v. Rocco Realty Trust*, 94 Mass. App. Ct. 1103 (2018) (Rule 1:28), *rev. denied*, 481 Mass. 1102 (2018). We win some … and we lose some.

In October 2018, Patrick Groulx and Maria Davis wrote a brief in *Everest Nat'l Ins. Co. v. Berkeley Place Restaurant Ltd. Partnership* (SJC-12550), a subrogation action in which the underlying tort action had settled and only defendants remained parties.

In a particularly creative argument that drew heavily upon a line of California authorities, MATA urged the SJC to recognize the duty of reasonable care that a valet owes to the general public to refuse to turn car keys over to a driver who appears intoxicated, or in the alternative, to take affirmative steps to notify law enforcement upon handing the keys over to such a driver.

On the day before the scheduled oral argument, 19 days after MATA filed its brief, the parties settled the case. There is no way to tell whether MATA's brief played any role in that settlement, but the timing certainly prompts speculation.

In November 2018, John Mateus and the undersigned wrote a brief in *Oliver v. Metro. Life Ins. Co.* (SJC-12544), a certified question sent to the SJC from the U.S. District Court and arising from an asbestos litigation matter.

In a monstrous brief including in the addendum a complete survey of the law in all 50 states, MATA urged the SJC to hold that the statute of repose does not apply to asbestos illnesses or to other latent illnesses. In the alternative, MATA urged that the statute of repose does not apply to asbestos illnesses or to other latent illnesses in instances in which a defendant had knowing control of the instrumentality of injury at the time of exposure.

The SJC held oral argument on Dec. 4, 2018, and the case is now under advisement.

On its way out the door at press time is a brief authored by Liz Mulvey and Boston College Law School student Nickolas I. Merrill, in a joint effort with Jeff White and Amy Brogioli of the AAJ, in *Hedberg v. Wakamatsu* (SJC-12624), a medical malpractice case.

MATA and AAJ will argue that the statements of a medical student are admissible against the supervising physician, either as the statements of an agent against a principal or as statements of a witness who is unavailable due to professed lack of memory on the part of the medical student.

In the former argument, MATA and the AAJ will urge that the SJC hold that an agency relationship exists between a medical student and a supervising physician. In the latter argument, MATA and the AAJ will urge that the SJC adopt Mass. G. Evid. §804(a)(3) and hold that lack of memory is a grounds for finding that a witness is unavailable for purposes of hearsay exceptions.

In the immortal words of "The Kentucky Fried Movie" (1977), "We are building a fighting force of extraordinary magnitude." To that end, anyone interested in helping to shape the law by doing research, drafting or editing on these briefs is welcome to get involved.

It is a great way to give back to the system, to make the sort of far-reaching policy arguments that many of us fantasized about in law school, and to hone your writing chops. If you are interested, please contact the interim chair.

Mr. Powers has been active in the Massachusetts appellate bar since 2006, a member of MATA's Amicus Committee since 2017, and Interim Chair since 2018. In addition to his reported decisions, he has co-written or edited several of MATA's recent amicus filings.

ALTERNATIVE DISPUTE RESOLUTION

To be listed in the ADR Directory, please call Elaine Fanning at (617) 218-8222 or email efanning@lawyersweekly.com

"Creative!"

Fitzgerald Dispute Resolution LLC

617.241.4299 • wf@fitzgeraldresolution.com

WWW.FITZGERALDRESOLUTION.COM

We are so pleased to announce our new partnership with Atlas Travel!

Our team at Atlas will coordinate all of our travel needs for our annual getaway to Bermuda. We hope you can join us for this fun-filled trip!

Save the Date
November 1-5, 2019
The Fairmont Southampton
Princess, Bermuda
For more information, please visit www.massacademy.com