



President's Message

Civics and civility

By Thomas R. Murphy



It's getting so I can't even watch the news. Every day we see the corpulent one: with his shock of orange hair, signature red ties, and ill-fitting topcoat strutting and fretting on TV or fomenting uncivility on Twitter.

But forgive me: I don't mean to bemoan the *lack* of civility; I want to stress the *importance* of civility as well as relationships with those we meet in the practice of law. Related to that is the topic of civics.

The significance of civility stems from the idea that this really is a great country — there's no "again" about it; nowhere else in the world does one get a trial by jury on so many different issues.

As the President of a Trial Lawyers Association in Arkansas reminded me, the Seventh Amendment is the one that protects all the others. Trial practice is about a thousand years old, and while they've tweaked the rules of evidence over the years, it is here to stay. And while the frequency of jury trials has steadily declined in the past few decades, we're fortunate to have people like Chris Kenney, President of the Massachusetts Bar Association, who instituted the Trial Academy for newer lawyers. After some training he'll then pair them

with pro se clients for trial-only pro bono representation. Truly, both the bench and the bar are indebted to Chris for that initiative.

Unfortunately, in this the age of he-who-must-not-be-named (i.e., the corpulent one, *supra*) uncivil behavior is on the rise. But as Joni

Relationships are everything in this business and once you lose your integrity, you may as well go into gardening.

Mitchell reminded us almost 50 years ago, we need to get back to the garden.

So think twice before you launch into speaking objections during a deposition (they are unquestionably improper), ask yourself if you really need to send that Sup. Ct. R. 9C letter (pick up the phone and work it out) and re-read that nasty-gram before clicking "send" to your opponent (there is no un-send tab).

Those of us fortunate enough to have practiced in the motion session remember that the relationships formed in this line of work are crucial. Just yesterday, I was in a mediation and who did the insurance company fly in with a bag of money but a senior-level adjuster I used to do work

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Lifetime Award to be bestowed on Mike Mone

By Sheila Sweeney

Mike Mone is a nationally recognized civil trial lawyer who has been a pioneer in the field of tort litigation.

A graduate of Middlebury College, he obtained his J.D. from Boston College Law School in 1967. Mone was awarded Honorary Doctor of Law Degrees from Middlebury College and Suffolk University.



MONE

A longtime partner in the Boston law firm of Esdaile, Barrett, Jacobs and Mone, he specializes in complex litigation with a particular interest in products liability, medical malpractice, aviation and insurance law cases.

Mone has been listed in every edition of "The Best Lawyers in America" and served as a fellow and then a regent in 1995 of The American College of Trial Lawyers. After serving as secretary and president-elect, he became the 50th president of the College in 1999. He is the only plaintiffs' attorney to have served as president of the College.

A former president of the Massachusetts Academy of Trial Attorneys, he served on the National Board of Governors of the Association of Trial Lawyers of America.

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EDITOR'S NOTE

Why judges may resist panel voir dire ... and how to address their concerns

By Jonathan A. Karon



The Superior Court bench and the trial bar share the common goal of identifying juror bias. Yet some Superior Court judges are reluctant to allow

panel voir dire. This is frustrating and sometimes puzzling to MATA members who believe (as do I) that panel voir dire is the most efficient and effective method of uncovering both implicit and explicit bias.

Not surprisingly, the judicial perspective (the "view from the bench") is different from ours. Accordingly, I made some inquiries, hoping to gain

some insight into why our request for panel voir dire is sometimes denied. Here is what I learned, together with some brief suggestions of my own.

Informed sources advise that there are three main reasons why judges may be reluctant to allow panel voir dire:

1. **Concern that a lawyer will em-**

barrass a juror or invade their privacy. This concern is understandable and explicitly mentioned in Superior Court Rule 6 (4)(a), which directs that questioning shall be conducted individually if it "concerns private or potentially embarrassing information." Regardless of the rule, no responsible or effective lawyer should ever do anything likely to embarrass a potential juror. You should always, prior to impanelment, consider whether any of your questions might invade a juror's privacy and, if so, whether they would be better asked at side bar or better not asked at all. It may also make sense to tell the panel that they should feel free not answer any question that makes them uncomfortable



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'Sorry, bruh': issues relative to electric scooters

By Kevin J. Powers



The 2018 Halloween episode of the television show "South Park," titled "the Scoots," illustrated with but mild exaggeration the extent to which

hordes of electric scooters, without regulation and without adequate insurance coverage, could easily become a major hazard to motorists.

When driver Mr. Mackey attempts to navigate a road in his car and is barraged with scooter riders, his cries of "You just ran a [expletive] red light!" and "Who's going to pay for this [property damage]?" are answered with lackadaisical retorts of "Sorry, bruh" from the scooter riders, who simply ride away from every collision.

In the meantime, no representative of the nameless, faceless scooter company ever comes to the town to speak with motorists and pedestrians impacted by the scooters. Yes, "South Park" is good-humored fun, but life may very quickly imitate "South Park" if a deluge of scooters hit the streets without at least a modicum of regulatory oversight to ensure the safety of all road users.

On the heels of a scramble by legislatures, in Massachusetts and nationwide, to address a cavalcade of legal issues arising in the context of ride-share services, the arrival of electric scooters in hip cities across the country is shaping up to be the next alternative transportation area to vex litigators and lawmakers.

As reported by Boston.com, Cambridge and Somerville ordered electric scooter company Bird to withdraw from their cities in July of 2018, but Bird and other scooter companies are eager to re-enter the Greater Boston market. This article will survey some of the issues in this area of law and potential legislative steps to address the most glaring problems.

A mixed breed. Massachusetts General Laws c. 90, §1 defines "motorized scooter" as "any 2 wheeled tandem or 3 wheeled device, that has handlebars, designed to be stood or sat upon by the operator, powered by an electric or gas powered motor that is capable of propelling the device with or without human propulsion" and excludes motorcycles, motorbikes and motorized wheelchairs.

Electric scooters are descended physically from the Segway, but take their business model from the ride-share industry. Electric scooter companies generally market shared

Kevin J. 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.



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scooters, unlocked via a smartphone app and rented by length of ride. These "fleet" scooter companies include Uber, Lyft, Lime, Razor, Spin, BeeScoot and Bird. Scooters are proliferating rapidly across major urban markets, much as ride-share services proliferated in the same way several years ago.

Major scooter injuries. Results of one California study published by the Journal of the American Medical Association indicate that the vast majority of electric scooter riders — approximately 95 percent — do not use helmets. Most reported scooter injuries result from falling, with a plurality (over 40 percent) involving head injury, many others (over 30 percent) involving fractures and the remainder involving lesser injuries such as bruises, sprains and cuts.

Beyond riders themselves, scooters can also injure pedestrians when those pedestrians collide with or trip over scooters. Seventy-five percent of scooter-related injuries occurred in the evening or night — between 3 p.m. and 7 a.m.

Poor design. Scooters generally have small wheels, susceptible to catching in railroad or streetcar tracks. Brake lights and headlights on scooters are often tiny and ineffective, failing to provide sufficient visibility to alert other road users to the presence and trajectory of the scooters. Many compact scooter models lack easily operable brakes; even when scooters have such brakes, the rapid profusion of scooters has prompted a backlash in which annoyed drivers or pedestrians cut their brake cables. These acts of sabotage remain latent to scooter riders until the moment that their brakes fail to work.

Unlike automobiles, scooters are not generally subject to regular inspection and maintenance requirements. The only maintenance issue that scooter companies routinely address, and then only in "fleet" or ride-share style operations, is the depleted battery — a maintenance issue that also happens to render a scooter unprofitable.

Lack of insurance coverage. Scooter riders frequently are young,

do not own cars or homes and lack most or all of the insurance policies that one might otherwise expect to cover injuries incurred through motor vehicle use, even including private health insurance. Consequently, Medicaid — MassHealth in the Commonwealth — will likely be saddled with the financial burdens associated with medical treatment, long-term care, pain and suffering due to scooter-related injuries. These financial burdens impact both scooter riders and pedestrians injured by scooter riders.

Property damage from scooters would also likely fall outside of available coverage. Despite the obvi-

The arrival of electric scooters in hip cities across the country is shaping up to be the next alternative transportation area to vex litigators and lawmakers.

ous legal and ethical issues, scooter companies classify as independent contractors the workers who pick up orphaned, battery-depleted scooters and then recharge and redistribute those scooters for further "fleet" use; scooter companies offer these contractors prizes and small cash bounties on a per-scooter basis, frequently inducing harsh competition between contractors.

Contracts of adhesion, releases of liability, etc. It is unknown whether smartphone users spend any more time reading voluminous scooter rental terms than those same smartphone users spend reading voluminous software terms, i.e., little to none. Those voluminous scooter rental terms — classic examples of contracts of adhesion — frequently include "as-is" provisions, releases of manufacturer liability and limitations of liability to \$100. The same terms also often cripple the litigation rights of scooter users through mandatory arbitration and confidentiality clauses (effectively preventing the public from ever learning of the defects and hazards that not only caused one scooter user's injuries, but also continue to endanger thousands of other scooter users), and

waivers of rights to proceed via class actions.

Existing Massachusetts legislation. Massachusetts General Laws c. 90, §1E, enacted in 2004, during the heyday of the Segway, regulates "motorized scooters." That statute (1) requires a driver's license or learner's permit, (2) caps speeds at twenty miles per hour, (3) requires riders to conform to all traffic laws and regulations, (4) forbids scooter operation on limited access or express state highways where posted, (5) requires that all scooters be equipped with operational stop and turn signals, (6) forbids scooter operation after sunset or before sunrise, (7) requires protective headgear and (8) forbids transportation of passengers on scooters.

If G.L.c. 90, §1E has significant shortcomings, then they lie perhaps in its teeth and in its crowns; maximum fines for violations range only from \$25 for a first violation to \$100 for a third or subsequent violation, and the statute does not require insurance coverage.

Scooter company opposition to regulation and modification. Scooter companies have stalwartly opposed both protective legislation and mechanical modifications to their scooters. In Massachusetts, scooter companies have refused to comply with brake light and turn signal requirements of G.L.c. 90, §1E. In California, scooter companies have

supported California legislation ending helmet requirements for adults using scooters.

Some legislators have demanded that scooter companies rise to meet legal requirements, but others have proposed legislation that would lower legal requirements to meet industry demands for lax safety standards.

A proposed model act. A proposed model act, entitled the "Safe Small Vehicle Rental Service Act," duplicates several requirements of G.L.c. 90, §1E. However, the model act also addresses the numerous insurance coverage, waiver of liability and other issues discussed *supra*, while providing for licensure of scooter companies and broader regulation in the future. In addition to setting forth statutory scooter safety requirements akin to G.L.c. 90, §1E, the model act would also enable the appropriate department of the state — in Massachusetts, presumably the Department of Transportation — to regulate scooter companies and to promulgate appropriate additional rules. The model act would force scooter companies to negotiate the terms of a scooter distribution with a municipi-

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'Sorry, bruh': issues relative to electric scooters

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pality prior to entering it.

Perhaps most importantly, the model act would require that scooter companies certify that they carry certain minimum insurance coverage: workers compensation coverage with employers' liability limits of at least \$1 million per accident, injury or illness; commercial general liability coverage of at least \$2 million per occurrence and \$4 million aggregate for bodily injury and property damage; either general automobile liability coverage or motorized small vehicle liability coverage of at least \$2 million per accident; professional liability coverage of at least \$1 million per claim; and cyber and privacy coverage of at least \$2 million per claim.

The model act would also forbid or render unenforceable mandatory arbitration clauses, waivers of liability, class action waivers or other judicial remedy waivers.

Proposed Massachusetts legislation. As this article goes to press, a hearing of the Joint Committee on Transportation is scheduled for March 28, 2019. That hearing will consider 39 bills, including at least ten bills addressing electric scooters. The various bills range from proposals requiring only minors 16 years of age or under to wear helmets to enabling the Department of

Transportation to issue regulations to mandating insurance coverage and increasing fines for violations of safety requirements.

Some of the bills specifically address only electric scooters, while other bills, such as proposed legislation from Gov. Charlie Baker, deal with electric scooters as part of an omnibus road safety bill. Essentially all aspects of the model act are before the legislature in one or more of the proposed bills, but it is unclear at this time which will find their way into the General Laws.

Conclusions. The "Safe Small Vehicle Rental Service Act" is an aspirational set of requirements that are each eminently reasonable. The benefit of unregulated scooter fleets would be tremendous competition among scooter companies for low ride pricing. The detriment of such fleets would be passing the cost of injuries onto the taxpayers who fund MassHealth, and onto the injured riders who tapped a smartphone app without contemplating the need for insurance coverage and without reading dozens of pages of terms and conditions eviscerating their rights.

Much of the background material for this article came from a presentation delivered

in early 2019 by Christopher Dolan of Dolan Law Firm to the Consumer Attorneys of California and from Tarak K. Trivedi, MD, MS, et al., Injuries Associated With Standing Electric Scooter Use, JAMA (Jan. 25, 2019). Recent interactions between the Commonwealth, municipalities and scooter companies are discussed in Nik DeCosta-Klipa, "Here's why Cambridge and Somerville are threatening to confiscate

Bird's scooters," Boston.com, Aug. 1, 2018, available at <https://www.boston.com/news/local-news/2018/08/01/bird-scooters-cambridge-somerville>; and in Nik DeCosta-Klipa, "Charlie Baker wants to fix Massachusetts's electric scooter problem", Boston.com, Jan. 22, 2019, available at <https://www.boston.com/news/local-news/2019/01/22/charlie-baker-electric-scooters-massachusetts>.

Friend of Justice Award to be presented to PAIR Project

On May 16, the Massachusetts Academy of Trial Attorneys will



ANITA P. SHARMA
PAIR Executive
Director

recognize the Political Asylum/Immigration Representation (PAIR) Project for its decades of dedication to providing representation and advocacy to people in need. MATA will present the PAIR Project with the 2019 Friend of Justice Award.

PAIR is the leading provider of

pro bono immigration legal services to asylum-seekers and immigrants unjustly detained in Massachusetts. The PAIR Project is a nationally recognized pro bono model that works to secure safety and freedom for asylum-seekers who have fled from persecution throughout the world and to promote the rights of immigrants unjustly detained. PAIR provides hope and a new beginning to asylum-seekers, torture survivors and immigration detainees.

At a time when the work of the PAIR Project is needed more than ever, MATA is proud to recognize the crucial work performed by the organization.



MATA Annual Dinner & Convention

May 16, 2019
at the Sheraton Framingham

9:00 AM Registration

10:00 AM - 5:30 PM Educational Seminars

6:00 PM Reception - 7:00 PM Dinner

2019 Dinner Honorees

MATA 2019 Lifetime Achievement Award

Michael E. Mone, Esq.

MATA 2019 Legislator of the Year Award

Representative Jeffrey N. Roy

MATA 2019 Excellence in Court Management Award

Carlotta McCarthy Patten, Second Assistant Clerk, Essex Superior Court

MATA 2019 Friend of Justice Award

Political Asylum/Immigration Representation (PAIR) Project