President's Message



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How fast life changes

By Kathy Jo Cook



When I last wrote this column, I was waiting for a Suffolk Superior Court jury to return a verdict at the end of a very long trial. It never occurred to me that just a couple of months later, I would be writing this, my final President's Message, from my home office after having been quarantined for nearly a month. Who would have ever thought that something like the COVID-19 pandemic could happen and we would all be at home?

A lot has changed in the last month.

We lost our dear friend and colleague, Mike Mone. Mike was a well-known trial attorney across the country. He held prominent positions in many organizations, including serving as president of the American College of Trial Attorneys, the American Trial Lawyers Association (AAJ), the Massachusetts Bar Association, and MATA.

More importantly, though, Mike was one of us. We look forward to celebrating his extraordinary life with his family in the future.

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EDITOR'S NOTE

Staying sane: Rick Friedman to the rescue

By Jonathan A. Karon



This is not the column I expected to write. I had planned on sharing some thoughts on cross-examining expert

witnesses. Then coronavirus hit, the MATA Journal submission deadline was extended, and the world turned upside down.

I'm writing this in mid-April with an expected publication date in June. Presently, all jury trials are on hold, trial courts are essentially handling emergency business only, and everyone is working from home. It's possible things will be back to "normal" by the time you read this, but I doubt it.

So, rather than providing suggestions on how to conduct cross-examinations in trials that will likely be pushed back for at least a few months, I'm going to discuss a more pressing topic. Specifically, staying sane in this crazy profession we've chosen.

Being a trial lawyer is a crazy way to make a living. It requires us to be riverboat gamblers, social workers, teachers, performers, quick study experts, probing interrogators, shrewd negotiators and private investigators.

We know we have to be fearless warriors for justice, always putting our clients' interests first, while warding off that nagging thought that, hey, we might not get paid for any of this.

Most of us are naturally competitive and can't stop from comparing ourselves to our colleagues. It always seems like there's someone else who does better, gets bigger verdicts, gets larger settlements, and knows all the answers. Not only that, but we have to be able to face losing trials and usually never really knowing why.

On top of all that, for the time being, we're stuck at home, trying to find ways to move our cases forward, with no idea when trials will resume.

My trial lawyer friends know that I'm a big fan of Rick Friedman, the Washington plaintiffs' lawyer who wrote "Rules of the Road," "Polarizing the Case" and "The Elements of Trial." But my favorite Rick Friedman book is "Becoming a Trial Lawyer," which is not his autobiography but instead advice on staying sane and avoiding the mental traps that not only drive us crazy but can actually get in the way of

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Videotape all Rule 35 examinations

By Andrew M. Abraham



Imagine if the defense requested to interview your client alone without your presence and no real way to record what was

said. The defense counsel could then create a report supposedly quoting or paraphrasing your client. They could claim that the client was able to perform tasks that are inconsistent with his injuries.

Would you let that happen? If you would, contact your malpractice carrier.

Why are we less lax with a defense

medical examination? The doctors are paid agents of the insurance companies or the defense lawyers.



Many of them make a substantial portion of their income doing these examinations. Why should we trust them? I have

personally observed the dishonesty in their reports in cases in which they knew they were being videotaped. Failure to report tests' damaging results, cueing witnesses for answers, and "forgetting" to include the fact that

they were cued are common.

Many times, the administration of the test is improper; a delayed memory test that requires a fiveminute delay is actually two, or incorrect answers are marked as correct. I recently was given an examination that called for serial 7 subtractions. After the client made a mistake (and was cued that he made a mistake and allowed to repeat the test, making the mistake again), the defense medical examiner switched the test to a much easier serial 3 test. Her report failed to mention the failure of the serial 7, the cueing and additional attempt, and the switch to serial 3 examination.

In other cases, statements attributed to the client as quotes



are nowhere to be found. In one case, Dr. Price, a frequent DME, reported that my client stated he

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An appellate roadmap, Part 1

By Kevin J. Powers and Thomas R. Murphy





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Appellate procedure can be confusing to many experienced trial lawyers. Here, we hope to provide a relatively simple, easy-to-follow route through the rules that govern appeals in Massachusetts.

We have organized the steps chronologically, in a series of deadlines. The reader should consult the primary sources — i.e., the Massachusetts Rules of Appellate Procedure and Reporter's Notes — for each point, but this map of the major twists and turns may be a useful and compact overview.

Our subject here is an appeal from a final judgment in a state trial court to the Appeals Court or Supreme Judicial Court. Federal appeals, appeals to the Appellate Division of the District Court and the Boston Municipal Court, and interlocutory appeals are for another day.

This first article maps the journey from notice of appeal through stay or injunction pending appeal.

Notice of appeal

Deadline 1: 30 Days after entry of judgment (60 days from civil judgment in a non-child welfare case where the Commonwealth is a party): Deadline to file and serve notice of appeal in trial court.

The most crucial timing step. The timely filing of the notice of appeal is the most crucial timing step in the appeal; missing this deadline could well be fatal. By contrast, "[f] ailure of an appellant to take any step other than the timely filing of a notice of appeal shall not affect the validity of the appeal, but shall be

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Thomas R. Murphy, a sole practitioner in Salem, is MATA's immediate past president and chair of the Amicus Committee. He has been lead appellate counsel in many reported cases, among them DiCarlo v. Suffolk Construction Co., Inc., 473 Mass. 624 (2016), and he has written, co-written or edited more than 30 of MATA's amicus filings. He can be reached at trmurphy@trmlaw.net.



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ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal." Mass. R. App. P. 3(a)(1).

When to file. The appellant must file a notice of appeal "within 30 days of the date of entry of the judgment, decree, appealable order, or adjudication appealed from[.]" Mass. R. App. P. 4(a)(1) (civil); see also Mass. R. App. P. 4(b)(1) (criminal). "[B]ut if the Commonwealth or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry [in a civil case.]" Mass. R. App. P. 4(a)(1). "[E]xcept in child welfare cases, in which the notice of appeal shall be filed within 30 days from the date of entry[.]" *Id.*

Where to file. File the notice of appeal "with the clerk of the lower court[.]" Mass. R. App. P. 4(a)(1); see also Mass. R. App. P. 3(a)(1) (same). "If a notice of appeal is mistakenly filed in an appellate court, the clerk of such appellate court shall note the date on which it was received and transmit it to the clerk of the lower court from which the appeal was taken and it shall be deemed filed in such lower court on the date so noted." *Id*.

Service required. The appellant must effect "service upon all parties." Mass. R. App. P. 3(a)(1). Be sure to do this even though the rules say that "[t]he clerk of the lower court shall serve notice of the filing of a notice of appeal by transmitting a copy thereof to counsel of record for each party other than the appellant, or, if a party is not represented by counsel, to the party." Mass. R. App. P. 3(d) & Reporter's Notes (2019).

Contents. This filing, like a civil complaint, is essentially a notice document; therefore, it must "specify the party or parties taking the appeal and shall, in civil cases, designate the judgment, decree, adjudication, order, or part thereof appealed from." Mass. R. App. P. 3(c)(1). Likewise, where multiple parties appeal "and their interests are such as to make joinder practicable, they may

file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal." Mass. R. App. P. 3(b). In other words, just get it done, and use both the proverbial belt and the proverbial suspenders while you are at it.

Child welfare cases. To eliminate appeals on behalf of absent and disinterested clients, adult child welfare clients must sign both the notice of appeal and request for a transcript. Mass. R. App. P. 3(c)(2) & Reporter's Notes (1999).

Deadline 2: 14 Days after another party files notice of appeal: Deadline to file and serve notice of cross appeal in trial court.

Notice of cross appeal within 14 days after another party files notice of appeal.

(2) and 30 filed in the lower court within 30 days after the verdict or finding of guilt or within 30 days after imposition of sentence, and the full time fixed by this rule shall commence to run and shall be computed from the date of entry of an order denying such motion." Mass. R. App. P. 4(b)(2).

Best practice: file, file and file again. For the time and effort involved in filing and serving a notice of appeal (it is simply a one- or two-sentence notice), the appellant should file a new notice of appeal at every point at which a notice of appeal may be necessary. This is not the time to gamble or to split hairs over which motions, brought for which reasons, requesting which relief, could or should toll the deadline. File after entry of the judgment, and file after entry of the orders disposing of post-trial motions. There is no downside to the client for counsel filing too many notices of appeal; the downside for filing too few could be disastrous.

Deadline 4: 30 Days after expiration of time to file appeal: Deadline to file and serve motion for extension of time (with notice of appeal attached!) in trial court.

Excusable neglect required, and maximum trial court extension is 30 days. "Upon a showing of excusable neglect, the lower court may extend the time for filing the notice of appeal or notice of cross appeal by a period not to exceed 30 days from the expiration of the time otherwise prescribed by [Mass. R. App. P. 4]." Mass. R. App. P. 4(c).

Best practice: try to avoid relying

The final Hail Mary, in an appellant's attempt to overcome the failure to timely file a notice of appeal, is not before the trial court but before the Appeals Court.

"If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by [Mass. R. App. P. 4(a)(1)], whichever period last expires." Mass. R. App. P. 4(a)(1).

Deadline 3: 30 Days after disposition of post-trial motions: Deadline to file and serve another notice of appeal in trial court.

"A [civil] notice of appeal filed before the disposition of any timely motion listed in [Mass. R. App. P.] 4(a)(2) shall have no effect. A new notice of appeal shall be filed within the prescribed time measured from the entry of the order disposing of the last such remaining motion." Mass. R. App. P. 4(a)(3) (civil). In criminal cases, "[t]he running of the time for filing a notice of appeal shall be terminated as to the moving party by a motion for a new trial pursuant to [Mass. R. Crim. P.] 25(b)

upon the motion. Unless truly unavoidable, the appellant should never rely upon the hope of obtaining an extension under Mass. R. App. P. 4(c). Many times, the Appeals Court has demonstrated its willingness both to reverse trial court orders allowing such extensions and to affirm trial court orders denying them. See, e.g., Pierce v. Hansen Eng'g & Mach. Co., Inc., 95 Mass. App. Ct. 713, 718 (2019) (reversing allowance of extension); Shaev v. Alvord, 66 Mass. App. Ct. 910, 912 (2006) (same); BJ's Wholesale Club, Inc. v. City Council of Fitchburg, 52 Mass. App. Ct. 585, 589 (2001) (affirming denial of extension). It would be a punishing journey for client (and probably malpractice for counsel) to travel the entire length of the appellate road, only to discover at the destination that the trial court should have closed the on-ramp in

An appellate roadmap, Part 1

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the first instance.

Best practice: always serve any such motion. Although Mass. R. App. P. 4(c) states only that a motion to extend "shall be made by motion with service upon all other parties" "if a request for an extension is made after [the time otherwise granted by Mass. R. App. P. 4] has expired," the best practice is to file a motion and serve the motion upon all other parties. The type of gunboat diplomacy often seen in the trial court does not fly in an appellate court, and professional decorum demands that everyone adhere to the staid and respectful norms of appellate practice from day one.

Deadline 5: 1 Year after expiration of time to file appeal: Deadline to file and serve motion for extension of time (with notice of appeal attached!) in Appeals Court.

An absolute one-year deadline. The final Hail Mary, in an appellant's attempt to overcome the failure to timely file a notice of appeal, is not before the trial court but before the Appeals Court. Mass. R. App. P. 14(b) ("[t]he appellate court or a single justice of the appellate court in which the appeal will be, or is, docketed for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time"). Even that long-shot gambit, however, has its own absolute deadline, and the expiration of one year will bolt

the door to the Appeals Court shut for all time. *Id.* ("but neither the appellate court nor a single justice may enlarge the time for filing a notice of appeal beyond 1 year from the date of entry of the judgment or order sought to be reviewed, or, in a criminal case, from the date of the verdict or finding of guilt or the date of imposition of sentence, whichever date is later").

"a motion to appoint counsel for appellate purposes in the lower court." Mass. R. App. P. 3(f)(2).

Appointed trial counsel continues representation until appellate counsel appointed. Appointed trial counsel "shall continue to represent [the client] on appeal until an appearance is filed by substitute counsel, if such assignment of counsel is made by [CPCS]." Mass. R. App. P. 3(e)

There is no downside to the client for counsel filing too many notices of appeal; the downside for filing too few could be disastrous.

Court-appointed counsel

Deadline 1: Day of filing notice of appeal: Deadline to request appointment of appellate counsel.

Appointed trial counsel must immediately request appointment of appellate counsel. In criminal and non-child welfare civil cases, "assigned trial court counsel shall, no later than the day on which the notice of appeal is filed, notify the Committee for Public Counsel Services [CPCS] that appellate counsel should be assigned." Mass. R. App. P. 3(e). In child welfare cases, appointed trial counsel "shall, on the day upon which the signed notice of appeal is filed, file, and request a hearing on, a motion to allow reasonable costs associated with the appeal in the lower court" and

(criminal and non-child welfare civil cases); see also Mass. R. App. P. 3(f) (1) (child welfare cases). In child welfare cases, appointed trial court counsel "shall continue to represent the party at all lower court proceedings." Mass. R. App. P. 3(f)(2). Further, in child welfare cases, if the trial court has not allowed a motion to withdraw by appointed trial counsel "prior to the date on which the lower court transmits to the appellate court the notice of assembly of the record pursuant to [Mass. R. App. P. 9], lower court counsel will be designated as counsel in the appellate court." Mass. R. App. P. 3(f)(4).

Stay or injunction pending appeal

Stay must ordinarily be sought in

trial court. "In civil cases, an application for a stay of the judgment or order of a lower court pending appeal, or for approval of a bond under [Mass. R. App. P.] 6(a)(2), or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the lower court." Mass. R. App. P. 6(a)(1). Likewise, "[i]n criminal cases, an application for a stay of execution of a sentence pending appeal must ordinarily be made in the first instance in the lower court." Mass. R. App. P. 6(b)(1).

Specificity required in a motion to the appellate court or single justice. "A motion for such relief may be made to the appellate court or to a single justice, but the motion shall show that application to the lower court for the relief sought is not practicable, or that the lower court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the lower court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall be supported by affidavits. ... With the motion shall be filed such parts of the record as are relevant. Reasonable notice shall be given to all parties." Mass. R. App. P. 6(a)(1) (civil cases); see also Mass. R. App. P. 6(b) (analogous rule for criminal cases). Additional details appear in Mass. R. App. P. 6. MATA

President's message: How fast life changes

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The flurry of spring events, what I call "prom season" for lawyers, has been postponed or cancelled. Educational programs, similarly, including the Keith Mitnick program, have been postponed.

Our professional and personal lives have changed. I am sure I am

My challenge to you is put a positive spin on this. We are lawyers. We know how to argue both sides of a case.

not alone in saying that the last month has been challenging, learning to run a law firm from home, using Instacart to buy groceries, not going out to dinner, and not seeing the real faces of friends and family. Not many cars on the highway, so no car accidents. Not many people out and about, so no premises liability claims. And the list goes on.

What can we do in these uncertain times? The answer is: all of the things that we never had time to do before that will help us run a better law practice, be a better friend, and be a better family member.

Here are some concrete ideas that have worked for me ...

On the business side, my law firm has stepped up our marketing on social media, and it is working. We are getting a great response, probably because people are at home with less to do.

We have purchased new case management and intake software, and with any luck, we will have it up and running when we return to the office.

We have increased the productivity of our team by having daily Zoom meetings, admitting and discussing challenges, personal and professional, and committing to goals above and beyond our usual law work.

We have increased our social interaction in the law firm as well, with cocktails and mocktails on Thursday nights. And we have stepped up our education, attending more webinars and learning new practice areas.



On the personal side, my husband (the only real human being whom I have contact with) and I have learned how to engage with others creatively. We celebrated our first virtual Easter dinner last weekend, with the grandkids in charge of games. We regularly FaceTime our friends. We also put together puzzles, exercise, take walks and try to avoid watching too much news.

These are just a few of the positive takeaways from the COVID-19 pandemic. When we return to work, we may have more downtime than we did before. My challenge to you, my

friends and colleagues, is put a positive spin on this. We are lawyers. We know how to argue both sides of a case.

Many thanks to all of you for allowing me to serve as your president this year. It has been a wonderful experience, and I will miss it greatly. I may not have the opportunity to pass the baton formally (although I am still hopeful that I will), but you will be in good hands next year with Brendan Carney. He is a good lawyer, a good friend, and he is dedicated to our cause. He will serve you well as your next president.

Kathy Jo Cook, the 2019-2020 MATA president, is the managing member of KJC Law Firm, LLC, which represents individuals and businesses in civil and criminal cases, including personal injury, wrongful death, medical and legal malpractice, consumer protection and employment discrimination. She was the 2008-2009 president of the WBA of Massachusetts, and she has served on the boards and committees of a number of bar associations. She is an honors graduate of Suffolk University Law School and the University of Houston.